

OPINIONS
OF THE CORPORATION COUNSEL
AND ASSISTANTS
Volume XIX

OPINIONS

OF THE

CORPORATION COUNSEL

and ASSISTANTS

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CITY OF CHICAGO
DEPARTMENT OF LAW

January 1, 1936 to December 31, 1937

Edited and Compiled by
BARNET HODES
CORPORATION COUNSEL



Volume XIX

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PREFACE

In 1936, the consolidated and reorganized Chicago Department of Law published a printed volume of the legal opinions of the department that marked a radical departure from custom. This was volume XVIII of the *Opinions of the Corporation Counsel and Assistants*. In the judgment of the department, experience of the last two years has amply sanctioned the wisdom of the departures made in that volume.

Arrangement of the opinions in a functional and subject-matter pattern, instead of chronologically as was the habit of the past, has proved its worth. Not only did this functional arrangement serve to give the lawyers in the department a clearer focus of the City's legal problems, but the non-lawyer administrators of the other City departments and the interested laymen obtained an understanding of those same problems that was never possible before. This clearer focus on the part of the City's lawyers and the understanding on the part of non-lawyers—attested in many ways during the last two years—represent advantages to the City too obvious for discussion. It is from such understanding that solutions for complex governmental problems flow.

In addition to the new arrangement of the material, the fact that *all* the opinions rendered by the department during the period covered by volume XVIII (April 15, 1929 to December 31, 1935) were recorded in some fashion gave the volume an exceptional value. Previous volumes made no effort to be all-inclusive, and as a result the department in later years was deprived of valuable items. The digest method adopted in volume XVIII made it possible to include all the opinions, while still keeping the volume within reasonable physical dimensions, and thus completeness was obtained. There would seem to be no need to comment on the value of such completeness.

The present volume was prepared along the same lines as its predecessor. In a very real sense, it is supplementary to it. In

fact, the alert lawyer and citizen will use this volume in connection with volume XVIII, treating this as "volume two." Thus they will have an up-to-date, almost current, practical handbook on the legal problems that are involved in the operation of the city of Chicago. This, in truth, has been the goal in both volumes of the "new series"—to present vital, practical handbooks on municipal law rather than mere museum pieces or occasional reference works. In passing, it may be noted that the overall effort of the department since the reorganization begun in 1935, with regard to its opinion product, has been to give the quality of vitality, or currentness, to this product. It was felt that there was not much point in publishing opinions at all unless the published opinions served some practical value to the City. Serving merely the vanity of the authors was not enough excuse for publication—or for the expenditure of taxpayers' money.

From such a premise there naturally flowed another—that the sooner the opinions could be made available to all interested parties, the greater their practical value. Historians may wait patiently for an opinion written in 1936 to be published, say, in 1940, but lawyers in the employ of the City rarely may enjoy the luxury of such restraint. They are on the firing line now, and need their ammunition now. Recognition of this necessity for speed caused this department to adopt wholly new procedures all along the line with regard to its opinions.

The first step was to bring its published opinions up to date as soon as possible. Prior to 1936, volumes of printed opinions were prepared and published only haphazardly, or so it seemed. It was found in 1935, the year of the reorganization, that no volume had been issued since 1929, a lapse of six years, years among the most significant in the history of our municipality. This lack was remedied in the volume published in 1936—the one volume containing all the opinions since the date of the previous volume.

The next step was to keep the published opinions on a current basis, by means of a new publication inaugurated during 1937. This was the *Opinion Bulletin* of the Chicago Department of Law, published at regular intervals during the year, a service never before offered. In mimeographed form, the *Opinion Bulletin* keeps all the lawyers in the department, all City officials and interested members of the bar informed on opinions issued by this

office on as nearly a current basis as is possible. To cover the lapse between 1935 and 1937, the department also issued the *Opinion Bulletin Supplement* for the year 1936, which document, also in mimeographed form, contained all the opinions for the year 1936.

Now comes this volume, which supplements the mimeographed bulletins issued for the years 1936 and 1937. It contains all of the digests that appeared in the mimeographed bulletins for those two years. However, those digests have been edited and revised for the purposes of this printed volume. In addition, a large number of the opinions in full are given here with the digests, plus annotations. In short, the mimeographed bulletins, in addition to their own immediate value, have the additional value of serving as the basis for printed volumes such as this—making possible speedier compilation of such printed volumes, thus contributing importantly to the general scheme of obtaining currentness.

It is my pleasure as Corporation Counsel to observe that a product of this kind is a result of truly cooperative enterprise. Acknowledgment should be made first to the lawyers in the department who produced the original opinions. It is they who wrestled with the legal problems apparent in these pages. To the Research Division goes the credit for the work of assembling the material in this volume and for the digests and annotations, subject to approval by the legal staff, and for seeing the production through. This volume was especially the assignment of Mr. Bruce C. Scott, associate in the Research Division, with the assistance of his colleagues in the division, notably Esther G. Oswianza, under the general direction of Harry Kletzky.

Once again it is my pleasure to acknowledge the contributions to the department of my loyal and energetic assistants—most of whose names will be found in the table of authors of the opinions—and in particular the First Assistant Corporation Counsel, Mr. Joseph F. Grossman, and the heads of the various divisions, Mr. A. M. Smietanka, head of the Personal Injury division; Mr. Michael L. Rosinia, head of the Prosecuting division; Mr. Arthur A. Sullivan, head of the Local Improvements division; Mr. E. J. Kelly, head of the Investigation division. I should also like to mention the cooperation in ministerial ways of the Stenographic section, of which Miss Catherine Wilson is head, and of the ad-

ministrative services managed by the Chief Clerk, Mr. Edward Sullivan, and Mr. Willard Grant, Administrative Assistant. To the Works Progress Administration there goes appreciation for the assistance given in the preparation of the index, a part of a project for a comprehensive cumulative index to all nineteen volumes, to be published later.

A larger indebtedness for the value of this volume and its related services to the City is owing in a very real sense to His Honor, Mayor Edward J. Kelly. In the pages of the book, as well as in the record of the department, there is told a story of municipal progress. Chicago has been meeting and overcoming problems. The spirit that has made that possible has been actively nourished by Mayor Kelly and it is a pleasure to record that fact here.

BARNET HODES,
Corporation Counsel.

June, 1938.

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EXPLANATORY NOTES AND DATA

KEY TO CITATION ABBREVIATIONS

The City Code has been cited as in the following examples:

- Code '22: 629, 701 refers to sections 629 and 701 of the
Chicago Municipal Code of 1932.
- Code '31: 407-411* refers to sections 407 to 411, inclusive,
of the *Revised Chicago Code of 1931.*

The revised Illinois statutes have been cited as in the following examples:

- IRS '37, 24: 422a, refers to section 422a and sections 424
424-426 to 426, inclusive, of chapter 24 of the
Illinois State Bar Association's *Illinois
Revised Statutes of 1937.*
- ISBS '35, 24: 605 (1-4), refers to sections 605 (1) to 605 (4),
714 inclusive, and section 714 of chapter 24
of the Illinois State Bar Association's
Illinois Revised Statutes of 1935.
- SH '33, 24: 65(.67-70, refers to sections 65.67 to 65.70, inclu-
.73), 214-216, 401 sive, section 65.73, sections 214 to 216,
inclusive, and section 401 of chapter 24
of Smith-Hurd's *Revised Illinois Statutes
of 1933.*

* * * * *

- Cah Cahill's *Illinois Revised Statutes*
- CJ *Corpus Juris*
- Code '05 *Revised Municipal Code of Chicago of
1905*
- Code '11 *Chicago Code of 1911*
- Code '22 *Chicago Municipal Code of 1922*
- Code '31 *Revised Chicago Code of 1931*

* Unless otherwise indicated, citations of sections of the *Revised Chicago Code of 1931* mean those sections as amended up to the date of the opinion.

Coun. J.	<i>Journal of the Proceedings of the City Council of Chicago</i>
Ill. Laws	<i>Laws of the State of Illinois</i>
IRS	<i>Illinois Revised Statutes</i>
ISBS	<i>Illinois State Bar Association's Illinois Revised Statutes</i>
Op. Corp. Coun.	<i>Opinions of the Corporation Counsel and Assistants of Chicago</i>
Op. Ill. Atty. Gen.	<i>Opinions of the Attorney General of Illinois</i>
SH	<i>Smith-Hurd's Revised Illinois Statutes</i>
Sp. sess.	Special session
USCA	<i>United States Code Annotated</i>
US Stat.	<i>United States Statutes at Large</i>

DATA GIVEN WITH REPORTED OPINIONS

Above each opinion reported in this volume there is printed in italics the number of the opinion, the office or officer to whom the opinion was written, the initials of the person who prepared the opinion, the date of the opinion, and the length of the opinion in standard typewritten pages.

When the office or officer to whom the opinion was written is not indicated, the opinion was addressed to a person having public business with the City who was not a municipal official.

NUMBERING OF OPINIONS

The numbering of the opinions is a continuation of the chronological sequence of volume 18 of the *Opinions of the Corporation Counsel and Assistants*, but the arrangement of the opinions is according to their subject matter.

For reference convenience, a table of the opinion numbers with corresponding page numbers is given in this volume at page 541.

REFERENCES TO OPINIONS NOT INCLUDED, BUT NOTED

An annotation to an opinion digest which states, as in the case of Opinion No. 9490, p. 461, "Opinion No. 9490 * * * holds substantially the same as the above opinion" indicates

that Opinion No. 9490 has not been included in the volume because it is substantially the same as the opinion that is recorded, and is noted solely for the sake of completeness.

An annotation to an opinion digest which states, as in the case of Opinion No. 9444, page 300, "Opinion No. 9444 * * * discusses the same subject as the above opinion" indicates that the opinion thus noted gives an interpretation which has been revised. Such opinions are not otherwise recorded in this volume.

This information is given for its value to the City officials and employees, for the sake of completeness, and so that the Department of Law will have a permanent record of all opinions rendered.

ERRATA IN VOLUME XVIII OF THE OPINIONS OF THE CORPORATION COUNSEL AND ASSISTANTS

ERRORS IN TEXT

The following is a list of the errors which have been discovered in the preceding volume of *Opinions of the Corporation Counsel and Assistants*:—

<i>Page</i>	<i>Opinion No.</i>	<i>Correction</i>
5	7070	Citation: 14 U. S. 525 should read 114 U. S. 525.
102	8496	Citation: In the reference to <i>Ill. Laws, between Ill. Laws and (1933)</i> insert <i>3rd Sp. Sess.</i> so as to make the citation read <i>Ill. Laws, 3rd Sp. Sess. (1933), p. 159.</i>
515	6591	The following note should appear after the opinion: <i>Note: Act now excepts regulation of physical therapeutic establishments. SH' 31, 16¾: 16.</i>

<i>Page</i>	<i>Opinion No.</i>	<i>Correction</i>
555	7541	Date of opinion: 1932 should read 1934.
673	6712	Citation: In <i>Martens v. Public Service Company of Northern Illinois</i> , 219 Ill. 160 should read 219 Ill. App. 160.
795, 796	7574	Citation: In <i>People v. Schlitz</i> , 266 Ill. 22 should read 261 Ill. 22.
851	7812	The words <i>unless the procedure prescribed by statute is followed</i> should be omitted from the opinion digest, and a period should follow after the word <i>lien</i> .

ERRORS IN INDEX

<i>Page</i>	<i>Correction</i>
944	Opinion index: The page reference for Opinion No. 6511 should read 756 instead of 656.
947	Opinion index: The page reference for Opinion No. 6839 should read 751 instead of 651.
952	Opinion index: The page reference for Opinion No. 7308 should read 682 instead of 683.
965	Opinion index: The page reference for Opinion No. 8484 should read 544 instead of 542.
966	Opinion index: In the second column, 6th and 7th lines from bottom, the opinion numbers should read 8594 and 8595 instead of 9594 and 9595.
974	Under <i>Annuities and Benefits</i> ,— <i>Attachment and Garnishment</i> , p. 230 note should read p. 231 note.
977	Under <i>Assessment for Taxes</i> ,— <i>increasing</i> , p. 708 should read p. 702;— <i>Omitted Property</i> , p. 708 should read p. 702; <i>Review by courts</i> , p. 708 should read p. 702.
981	Under <i>Bonds</i> ,— <i>Fire Department, Ordinance for</i> , p. 656 should read p. 756.
986	Under <i>Century of Progress Exposition</i> ,— <i>Regulation of</i> , p. 82 should read p. 40.

<i>Page</i>	<i>Correction</i>
989	Under <i>Chicago Tunnel Co.</i> ,— <i>Steam transmission</i> , p. 730 should read p. 630.
1012	Under <i>Contracts</i> ,— <i>Purchase of additional amounts</i> , No. 8029 should read No. 8027.
1014	Under <i>Debt Limit</i> ,— <i>Park consolidation</i> , p. 651 should read p. 751.
1022	Under <i>Fences</i> ,— <i>Private property</i> , p. 572 should read p. 575.
1023	Under <i>Firearms</i> ,— <i>Permit from Police Commissioner</i> , p. 107, No. 8715 should read p. 111, No. 8156.
1038	Under <i>Junk Dealers and Yards</i> ,— <i>Zoning restrictions</i> , p. 545, No. 6921 should read p. 561, No. 8965.
1049	Under <i>License</i> , 4th line from the bottom, the words <i>Gold</i> , p. 543, No. 8261 should be inserted just before and along the same margin with <i>Hand Laundry</i> .
1050	Under <i>License</i> ,— <i>Livery cars, Requirements</i> , p. 495, No. 8664, should read p. 482, No. 8571.
1053	Under <i>License</i> ,— <i>Second-hand dealers, Dealers in old precious metals</i> , No. 8861 should read No. 8261.
1053	Under <i>License</i> ,— <i>Taxicabs, Revocation for failure to carry out proposed color scheme</i> , p. 542 should read p. 544.
1064	Under <i>Motor Vehicles</i> ,— <i>License by City, Exemptions</i> , No. 8656 should read No. 8653.
1068	Under <i>Municipal Employees' Annuity and Benefit Fund</i> ,— <i>Pregnancy disability</i> , p. 285 should read p. 282.
1074	Under <i>Ordinances</i> ,— <i>Discrimination in general ordinance</i> , p. 682 should read p. 683.
1081	Under <i>Police, Department of</i> ,— <i>Picketing</i> , p. 600 should read p. 400, No. 6891 should read No. 7266 and for the reference p. 601, No. 7997, No. 8940 only should be substituted.
1090	Under <i>Public Nuisances</i> ,— <i>Buildings</i> , p. 284 should read p. 384.
1099	Under <i>Salaries</i> ,— <i>Deductions, Non-working days</i> , p. 174 should read p. 147.

<i>Page</i>	<i>Correction</i>
1109	Under <i>Streets, Alleys, and Sidewalks</i> , 4th line from the bottom, the words <i>Use of</i> should be on line with <i>Transfer to park district</i> and should not have the present indentation.
1111	Under <i>Surety Bonds,—Cancellation</i> , the reference p. 174, No. 6617 should be struck out.
1119	Under <i>United States,—Coast Guard autos</i> , p. 493, No. 8622 should read p. 479, No. 8653.
1125	Under <i>Words and Phrases,—Annuity Act, Firemen</i> , p. 332 should read p. 322.
1129	Under <i>Zoning,—Non-conforming Use, Extension of</i> , p. 572 should read p. 575.

AUTHORS OF THE OPINIONS

Authors of the opinions recorded in this volume are indicated by their initials. The following is a list of the initials and the corresponding full names arranged in the alphabetical order of the initials.

A. A. S.	Arthur A. Sullivan
A. C.	Alphonse Cerza
A. F. G.	Al F. Gorman
B. H.	Barnet Hodes
C. H. L.	Carl H. Lundquist
C. N.	Casper Nathan
C. P. H.	Charles P. Horan
E. H.	Emmett Harrington
E. L. M.	Edmond L. Mulcahy
E. R. D.	Earle R. Downes
E. R. H.	Edward R. Hartigan
F. L. K.	Frank L. Kearney
F. V. M.	Fred V. Maguire
G. F. M.	George F. Mulligan
G. J. T.	George J. Tourek
J. A. S.	John A. Sweeney
J. F. G.	Joseph F. Grossman
J. H. S.	J. Herzl Segal
J. J. D.	James J. Danaher
J. J. S.	Joseph J. Sullivan
J. L. C.	James L. Coleman
L. V. R.	Leo V. Roeder
M. A. G.	Michael A. Goldberg
M. D. S.	Milton D. Smith
M. H. F.	Martin H. Foss
M. J. M.	Mark J. McNamara
N. N. E.	Norman N. Eiger
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Q. O.	Quin O'Brien
R. N.	Ruth Nelson
T. A. M.	Thomas A. Murphy
W. V. D.	William V. Daly
W. V. S.	Walter V. Schaefer



SECTION I

THE CITY'S POWERS AND THEIR ADMINISTRATION

CHAPTER I

POWERS AND DUTIES OF THE CITY COUNCIL AND THE CITY'S DEPARTMENTS AND OFFICES

A. THE CITY COUNCIL

SEPARATION OF RELIEF APPROPRIATION FROM ANNUAL APPROPRIATION ORDINANCE

(No. 9723—Chairman, Committee on Finance—J.F.G.—December 9, 1937—2 pp.)

The City Council may not pass an appropriation ordinance for relief purposes and a tax levy ordinance for relief purposes separate from, and before passage of, the annual appropriation ordinance and the annual tax levy ordinance. By statute, the City Council is required to pass a comprehensive annual appropriation ordinance and a comprehensive annual tax levy ordinance covering all of the needs of the City and may not pass those ordinances piecemeal or for units of departments or agencies of the City.

Citation: Cities and Villages act, art. VII, sec. 2a; art. VIII, sec. 1, 4.

OPINION OF FOREGOING SYNOPSIS

We have your letter of December 7, 1937, in which you inquire whether the City Council may pass a separate appropriation ordinance for the Chicago Relief Administration, and to follow same up by the passage of a tax levy ordinance, so as to make available to the Chicago Relief Administration necessary funds for its purposes through the sale of tax anticipation warrants, before the annual appropriation bill and tax levy ordinance for all other corporate purposes of the City may be passed.

Section 1 of article VIII of the Cities and Villages act provides that the City Council shall annually ascertain the total amount of appropriations for all corporate purposes legally made and to be collected from

the tax levy of that fiscal year, and by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose, respectively, shall levy the amount so ascertained upon all the property subject to taxation within the City. Section 4 of the same article provides that whenever the City is required to levy a tax for the payment of any particular debt, appropriation or liability the tax for such purpose shall be included in the total amount assessed by the City Council and certified to the County Clerk. Section 2a of article VII of the Cities and Villages act provides for the passage of an annual appropriation bill to defray all necessary expenses and liabilities of such corporation to be paid or incurred during such fiscal year, and that no further appropriation shall be made prior to the passage of the next succeeding annual appropriation bill.

It is obvious from the statutory provisions referred to that the annual appropriation bill and tax levy ordinance each must be a comprehensive ordinance covering all the needs of the City and that the passage of such ordinances piecemeal or in units of departments or separate agencies of the municipal government would probably be subject to successful attack.

We, therefore, advise against making an appropriation for relief purposes and a tax levy for same in advance of and separate from the general annual City appropriation bill.

INCORPORATION BY REFERENCE OF BUILDING SPECIFICATIONS

(No. 9578—Chairman, Subcommittee of Committee on Building and Zoning—E.L.M.—July 29, 1937—3½ pp.)

The City Council may, in enacting a new building code, incorporate by reference the definitely identified standard specifications of trade organizations at the time the new building code is passed, but this will not include any subsequent modifications of the specifications so incorporated. Trade association specifications adopted by reference must be as available as the adopting ordinance.

The proposed requirement that certain lumber shall bear the certified grade mark of the National Lumber Manufacturers' Association or of the Chicago Lumber Institute appears to be an unreasonable restriction as it appears to make the certified grade mark conclusive as to grade of timber used. The validity of that section would be more securely safeguarded if the section is so changed as to read that the certified grade mark of those

two trade associations will be *prima facie* evidence of the grade of the lumber.

Citations:

- Cases: Knapp v. Brooklyn, 97 NY 520 (1884).
Culver v. People, 161 Ill 81 (1896).
City of Charleston v. Johnson, 170 Ill 336 (1897).
Town of Cicero v. McCarthy, 172 Ill 279 (1898).
People v. Crossley, 261 Ill 78 (1913).
Other reference: Sutherland, *Statutory Construction*, vol. 2, sec. 405.

OPINION OF FOREGOING SYNOPSIS

Your letter of July 26, 1937, quoting parts of sections 3601.01a, 3601.02f, and 3601.04b of chapter 36 of an ordinance under consideration by your subcommittee, providing for the adoption of seven chapters of a new building code, has been referred * * * for reply.

In the next to the last paragraph you state:

"The subcommittee requests an opinion as to whether the ordinance as so drafted in these particulars would be valid or whether, in each instance, the specifications should be set out in full in the ordinance."

We find no legal objection to the incorporation by reference of the definitely identified standard specifications of the organizations designated in the sections of the ordinance outlined in your letter. This is simply the familiar legislative process of adopting certain portions of another ordinance, statute or document by reference. It is a method of legislation which is frequently followed and has uniformly been held to be free from constitutional objections. The effect of such reference is the same as though the provisions adopted had been incorporated bodily into the adopting ordinance. (Sutherland, *Statutory Construction*, vol. II, sec. 405.) Such adoption takes the adopted document as it exists at the time of the passage of the adopting act, and does not include subsequent additions or modification of the document so taken. (*Knapp v. Brooklyn*, 97 NY 520; *Culver v. People*, 161 Ill 81; *City of Charleston v. Johnson*, 170 Ill 336; *Town of Cicero v. McCarthy*, 172 Ill 279; *People v. Crossley*, 261 Ill 78.)

Another requirement necessary to the validity of an ordinance that incorporates by reference documents of the nature here under consideration is the availability of the incorporated document. Such document is required to be as available to the public as the adopting ordinance itself. In this connection we would call your attention to section 302.03 of chapter 3 of the proposed ordinance now being considered by your subcommittee. This section provides:

"302.03 STANDARD SPECIFICATIONS FOR MATERIALS AND TESTS:

"a) Documents. Wherever in this ordinance materials used in construction, methods of installation, fire tests of materials, or other build-

ing operations are required to conform to or be at least equal to the standard specifications of materials or of practice, standard tests of materials, fire tests of construction or of materials, or any other standard specification requirement recognized and accepted by a federal or state bureau, national technical organization, or national board of fire underwriters, and the specification or test of the bureau or society has been identified in this ordinance by the designation of the said bureau or society and the date of its publication, the said documents are hereby declared to be a part of this ordinance the same as if the specifications, regulations, or tests were herein fully set out; and it is further provided that authenticated copies of said documents shall be kept on file in the office of the City Clerk and the Commissioner of Buildings, from and after the date of the adoption of this ordinance."

When the provisions of this section are complied with as we believe they are in the sections of the ordinance outlined in your letter, we are of the opinion that the ordinance so drafted in these particulars is as valid as though the specifications so incorporated were set out in full in the ordinance.

That part of section 3601.02f quoted in your letter presents a question that raises some doubt as to the validity of the requirement that when certain timber is used with certain specified working stresses it shall bear the certified grade mark of a member of one of two specifically designated lumber organizations. That part of the section is quoted in your letter as follows:

"In Section 3601.02f the ordinance provides that 'Wherever a structural grade of Southern Yellow Pine or of Douglas Fir is used, with working stresses of fourteen hundred (1400) pounds or more per square inch, as given in Table 3601.02b or of one thousand (1,000) pounds or more as given in Table 3601.02c each member shall bear the certified grade mark of a member of the National Lumber Manufacturer's Association, or of the Chicago Lumber Institute.'"

The requirement that said timber shall bear the certified grade mark of a member of the National Lumber Manufacturer's Association or of the Chicago Lumber Institute appears to us to be an unreasonable restriction and is subject to the interpretation that such certified grade mark precludes further inspection and is conclusive as to the grade of timber used. We believe that the validity of the section would be more securely safeguarded if that part of section 3601.02f quoted in your letter were amended to read as follows:

"f) *Grade Marking.* Wherever a structural grade of Southern Yellow Pine or of Douglas Fir is used, with working stresses of fourteen hundred (1400) pounds or more per square inch, as given in Table 3601.02b or of one thousand (1,000) pounds or more as given in Table 3601.02c if each member shall bear the certified grade mark of the National Lumber Manufacturer's Association, or of the Chicago Lumber Institute, it shall be *prima facie* evidence of such grade of timber."

POWER TO LICENSE FOR REGULATION AND REVENUE

(No. 9592—*M.H.F.*—August 13, 1937—1½ pp.)

The City has power under the decisions of the courts to license both for regulation and for revenue.

Citations:

Kinsley v. Chicago, 124 Ill 359 (1888).

Chicago v. Arbuckle Bros., 344 Ill 597 (1931).

INSPECTION OF PLUMBING AND DRAINAGE—REGULATION OF SALE OF PLUMBING FIXTURES

(No. 9548—*Chairman, Commission for Revising the Building Code—A.F.G.*—June 28, 1937—5½ pp.)

The City Council is without power to place the inspection of plumbing and drainage in projected tenements, lodging houses, and other places of habitation in any department other than the Board of Health, but the Council may, if it deems advisable, place the inspection of buildings other than those enumerated in the Department of Public Works or in any other department of the City.

The City has no power to regulate the business of selling or manufacturing plumbing fixtures. However, the City has power to regulate dealers in secondhand articles, and reasonable regulations concerning the sale of secondhand plumbing fixtures would probably be upheld.

Citations:

Statute: ISBS '35, 24: 668-672.

Cities and Villages act, art. V, sec. 95.

Case: Holmes v. Oregon and California Ry., 5 Fed 523 (1881).

People v. Sholem, 294 Ill 204 (1920).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of May 26, 1937. You state that the plumbing code prepared by your subcommittee has provisions to govern the installation of water supply and the inspection of the same by the Board of Health. In the judgment of others these provisions should be in the Department of Public Works.

You ask our opinion on the jurisdiction of one or the other of the two departments, basing our opinion on such provisions as may be found in the statutes of the state of Illinois.

Ordinarily the question which of two departments, each equipped to function, shall have authority to enforce certain provisions of an ordinance is a question of policy for the City Council to determine and not a legal question for this office to decide. However, in the instant case a State law on the subject matter of plumbing inspection presents a different aspect.

In 1881, an act was passed by the legislature entitled: "An Act for the regulation and inspection of tenement and lodging houses, or other places of habitation." [ISBS (1935), p. 495.] Section 1 of the act provides that any person interested in any projected tenement, lodging house, or other place of habitation, in any city of 50,000 inhabitants, shall submit plans and specifications of such building to the Health commissioner of such city, who shall examine said plans for his approval or rejection as to the proposed plans for the ventilation of rooms, light and air shafts, windows, ventilation of water closets, drainage and plumbing.

Section 2 makes it the duty of the plumber or person interested in the contract for the plumbing work of such building to receive a written certificate of instruction from the Health commissioner before commencing work on said building and requiring him to proceed according to the plans, specifications and instructions as approved by the Health commissioner.

Section 3 is as follows:

"It shall be the duty of any plumber or other person or persons interested in the plumbing work, after the completion of said plumbing work, and before any of the said plumbing work is covered up in any building or buildings, or on the premises connected with said building or buildings, to notify in writing, the health commissioner or commissioners that said building or buildings, or other premises, are now ready for inspection, and it shall be unlawful for any plumber or other person or persons to cover up or in any way conceal such plumbing work in or about such building or buildings until the health commissioner or commissioners approve of the same."

The other two sections of the act provide penalties for violations of the law.

From a study of the foregoing statute it is apparent that the legislature intended that the inspection of plumbing and sewerage in projected tenements, lodging houses, and other places of habitation in cities of 50,000 inhabitants should be made by the Health commissioner of such city. "Habitation" has been defined to be a place of abode; a place to dwell in. (*Holmes v. Oregon and California Ry. Co.*, 5 Fed 523, 527.)

We are therefore of the opinion that the City Council is without power to place the inspection of plumbing and drainage in projected buildings of the classes enumerated in the foregoing statute in any department of the City other than the Board of Health.

Under the present ordinances of the city of Chicago the inspection of plumbing and drainage in all buildings in the City is vested in the Board

of Health. By the terms of the foregoing statute the inspection of plumbing and drainage in buildings in which people dwell, and which constitute a vast majority of the buildings in the City, is required to be in that department.

The City Council has power to place the inspection of plumbing and drainage in buildings other than those enumerated in the statute quoted above in the Department of Public Works or in any other department of the City. The question then arises would it be wise, where the statute places inspection of most of the buildings in the City in one department, for the Council to place the inspection of the remaining buildings in some other department? This is a question of policy resting in the sound discretion of the City Council.

You also quote a provision submitted by the plumbers' representatives and ask our comment and opinion thereon. The provision is as follows:

"It shall be unlawful for any person to sell, exchange, keep for sale, gift or offer for sale or gift, within the boundaries of the City of Chicago, any fixture as hereinabove defined, whether new or second-hand, unless the same has securely attached thereto, a label or sticker containing thereon, the name "City of Chicago" a serial number and the signature of the head of the Division of Plumbing and New Buildings of the City of Chicago, or a facsimile of such signature thereon."

"It shall be unlawful for any person to detach or remove any fixture from any building in which same is installed, or to install any fixture, unless such fixture has securely attached thereto, a label or sticker as described in this ordinance."

If the municipality attempted to prohibit the sale of new plumbing fixtures unless the said fixtures had attached thereto some label or sticker by some official of the municipality, it would be assuming the regulation of the business of persons engaged in the sale or manufacture of plumbing fixtures.

Before a municipality can regulate any business, it must be able to point to a statute which specifically grants it that power. We find no statute which gives to the City the power to regulate the business of selling or manufacturing plumbing fixtures. Under section 95 of article V of the Cities and Villages act, the City is given power to regulate dealers in second-hand articles, and reasonable regulations concerning the sale of second-hand plumbing fixtures would probably be upheld. The first paragraph of the provision quoted above is vague and meaningless unless other provisions which you do not quote make the meaning of this paragraph clear. What does the label or sticker, required to be attached signify? What standards are set up to guide the head of the Division of Plumbing in attaching or refusing to attach the label or sticker? Our courts have consistently frowned on the practice of vesting in ministerial officers discretionary powers without some rule, limitation or standard by which that discretion may be guided. (*People v. Sholem*, 294 Ill 204.)

The second paragraph quoted is equally vague. It provides, "It shall be unlawful for any person to detach or remove any fixture from any building in which the same is installed, * * * unless such fixture has securely attached thereto a label or sticker as described in this ordinance."

If it is intended that these labels or stickers are only to be attached to fixtures that measure up to a certain grade standard, they would not be attached to unsanitary, leaky, obsolete, or substandard fixtures. This latter class is the kind which owners generally desire to remove from their buildings. Under this provision these fixtures could not be removed because unlabeled, thus rendering modernization of plumbing in old buildings impossible.

We do not believe these provisions should be incorporated in the plumbing code.

APPROVAL OF CONDITIONAL PLAT OF DEDICATION

(No. 9522—*Committee on Local Industries, Streets, and Alleys*
—A.A.S.—May 17, 1937—2 pp.)

A person may conditionally dedicate land, which he owns, to the public if the conditions will not interfere with the purposes for which the land is dedicated. The City Council should exercise its discretion in determining whether the conditions attached to a conditional plat of dedication are acceptable to the City, and if they are acceptable, an order should be passed to authorize the Examiner of Subdivisions to approve the plat.

Citation: *People's Gas, Light, and Coke Co. v. Chicago*, 255 Ill 612 (1912).

ANNEXATION OF NON-CONTIGUOUS TERRITORY TO THE CITY

(No. 9404—*Chairman, Committee on Finance*—A.A.S.—January 19, 1937—2½ pp.)

The City Council is required by law to act upon an annexation petition adjudged valid and sufficient by the County Court. However, the statute provides for the annexation only of contiguous territory, and the City Council should refuse to annex territory which is not contiguous with the City by failing to give the question the necessary two-thirds vote until the annexation proceedings are corrected to include the streets necessary to make the territory contiguous to the City.

Citation: SH '35, 24: 369(D), 369a.

OPINION OF FOREGOING SYNOPSIS

You have referred to this office a letter dated December 17, 1936, from Honorable O. E. Hewitt, Commissioner of Public Works, to you, together with a certified copy of an order for the annexation of certain property in the vicinity of 115th Street and So. Central Park Avenue.

We have examined the final order in the annexation proceeding and are of the opinion that a portion of the property sought to be annexed is not contiguous to the city of Chicago for the reason that it is separated by streets which are not included in the annexation proceeding. The property set forth in the annexation proceeding is described by lot and block but does not include streets.

Under Section 1 of "An Act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," authority is given for the annexation of contiguous territory by the filing of a petition for annexation signed by a majority of the property-owners and by a majority of the legal voters residing in the territory praying for annexation. It also provides for notice.

Sub-section D of said section provides that the City Council shall, without unnecessary delay, proceed to consider the question of the annexation of said territory in the event the County Court shall adjudge said annexation petition to be valid and sufficient. The County Court has adjudged the annexation petitions to be valid and sufficient.

It is therefore necessary that the City Council act upon this petition. We suggest, however, that the City Council refuse to annex the said territory by failing to give to the question the necessary two-thirds vote until such time as the annexation proceeding can be corrected to include the streets making the territory contiguous to the city of Chicago.

Section 1-B of the same act provides for the annexation of territory used for highway and provides as follows:

"In addition to any other methods that are provided by law, any city, village or incorporated town may by ordinance annex any territory contiguous to such city, village or incorporated town, which is dedicated or used for street or highway purposes and a portion of such street or highway is already included within the limits of such city, village or incorporated town, and which is not included within the limits of any other city, village or incorporated town. Upon the passage of an ordinance of annexation a copy of such ordinance with an accurate map of the territory annexed, duly certified as correct by the clerk of the city, village or incorporated town shall be filed in the office of the recorder of deeds of the county in which the annexed property is located."

It would, no doubt, be possible for the City to annex the streets by following Section 1-B.

DISCONNECTION OF TERRITORY LAID OUT IN BLOCKS

(No. 9248—*Commissioner of Public Works—J.J.S.—July 27, 1936—3½ pp.*)

An ordinance passed by the City Council to disconnect from the City territory which is laid out in blocks is invalid because there is no statutory authority for such disconnection. The ordinance had no effect upon the streets surrounding the blocks attempted to be disconnected.

Citation: SH '35, 24: 372, 378a, 382, 385d.

REFERENDUM ON LOCAL TRANSPORTATION ACT

(No. 9051—*Chairman, Committee on Local Transportation—J.F.G.—February 11, 1936—1½ pp.*)

It is not mandatory upon the City Council to submit at the next primary election the question of amending the Cities and Villages act concerning local transportation companies in Chicago. The proposition may be voted upon at the next general election, or a special election may be called.

Citation: Ill. Laws (1935), p. 285, sec. 2.

PENSIONS FOR RETIRED ALDERMEN

(No. 9472—*Alderman, Third Ward—A.F.G.—March 12, 1937—2 pp.*)

The City Council has no power to compensate, in the form of pensions, retired aldermen who have served the City continuously for a definite number of years. However, the General Assembly may authorize the City Council to enact an ordinance granting pensions to retired aldermen.

The City Council has no inherent power and can exercise only such power as is expressly granted it.

B. THE POLICE DEPARTMENT

ARREST ON VIEW—SEARCH AND SEIZURE— ENTRAPMENT

(No. 9023—*Commissioner of Police—W.V.D.—January 18, 1936*
—6½ pp.)

The arrest on view in a tavern by a policeman of a person charged with infringing the ordinance prohibiting tape and slot machines violated none of the arrested person's constitutional rights.

Police officers of the City are authorized by statute to arrest without a warrant, any person in the act of violating an ordinance although a breach of the peace is not involved.

No search warrant is necessary for the search of any premises licensed under the Dram Shops act.

The search and seizure of a pin game in a tavern did not violate any of the constitutional guaranties of the tavern keeper since no search was necessary, for the pin game was placed in the public portion of the tavern and anyone entering the tavern had access to it. Its seizure was justified by the rule that when a person is charged with violating the law, any instrument or device found in his possession at the time of his arrest, by means of which he accomplished the crime, may be taken from him and used as evidence.

If the criminal design originated with the violator of the ordinance, he cannot escape conviction on the ground of entrapment merely because a police officer, who saw a pin game machine in a tavern and suspected the owner of using it for gambling purposes, acted in good faith to secure evidence by furnishing an opportunity to the bartender to engage in a gambling transaction.

Citations:

Constitution: Illinois, art. II, sec. 6.

Ordinance: Code '31: 4184.

Statute: ISBS '35, 37: 438; 38: 321; 43: 98.

- Cases:** *People v. Ford*, 356 Ill 572 (1934).
 Hermanson v. Schaffer, 184 Ill App 273 (1914).
 Wice v. Chicago and Northwestern Ry., 93 Ill App 266 (1901).
 Launder v. Chicago, Ill Ill 291 (1884).
 Schwuchow v. Chicago, 68 Ill 444 (1873).
 State v. Mausert, 95 Atl 991 (1915).
 Van Hook v. Helena, 170 Ark 1083 (1926).
 People v. Ficke, 343 Ill 367 (1931).
 Andrews v. United States, 162 US 420 (1896).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter requesting an opinion as to whether an arrest made on view in a tavern by a police officer on a charge of violating section 4184 of the Revised Chicago Code of 1931 can be sustained in court, please be advised that your inquiry raises three propositions of law, viz.:

The legality of an arrest by a police officer for the violation of an ordinance without a warrant.

Whether a search warrant is necessary for a search or seizure in a tavern.

Whether the fact that the police officer was a party to the act constituted an entrapment.

In answer to the first proposition, an arrest may be made by an officer or by a private person without a warrant for a criminal offense committed or attempted in his presence; by an officer when a criminal offense has in fact been committed and he has reasonable grounds for believing that the person to be arrested has committed it. The term "criminal offense" includes misdemeanor as well as felonies. (*People v. Ford*, 356 Ill 572.)

Although the defendant in the case cited in your letter might have been charged with violating section 321 of chapter 38 of the Illinois State Bar Statutes, 1935, he was charged with violating section 4184 of the Revised Chicago Code of 1931.

It may be stated generally that in the absence of a governing statute, a police officer may not, without a warrant, make an arrest for a violation of a municipal ordinance committed in his presence where there is nothing in the offense dangerous to the public or tending to cause a disturbance or breach of the peace, or to materially interfere with the public convenience. However, police officers of the city of Chicago are authorized by statute to arrest any person on view for violating within the city of Chicago any ordinance of said City.

Section 438 of chapter 37 of the Illinois State Bar Statutes, 1935, paragraph entitled "Arrest of violators of ordinances" reads as follows:

"Any police officer of the city of Chicago may arrest on view any

person who may be seen by such police officer in the act of violating, within the city of Chicago, any ordinance of said city, or any ordinance of any municipal corporation, situated, in whole or in part, within the limits of said city, whenever such violation is, by such ordinance, made punishable by fine or otherwise. Any person so arrested shall, without unnecessary delay, be taken by such officer to some convenient branch of the municipal court, and such police officer shall thereupon make and file a complaint in writing, under oath, against such defendant of the violation by such defendant of such ordinance, and such defendant shall thereupon be dealt with according to law in the same manner as if he had been arrested in the first instance under a warrant lawfully issued."

The power of police officers to arrest a person in the act of violating an ordinance though not involving a breach of the peace, without a warrant, has been sustained by our Appellate Court in the following cases:

Hermanson v. Schaffer, 184 Ill App 273.

Wice v. Chicago and Northwestern Ry., 93 Ill App 266.

In answer to the proposition whether the action of the police officer constituted a search and seizure in contravention of section 6 of article 2 of the Constitution of the state of Illinois, the security intended to be guaranteed by the provisions against wrongful searches and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law acting under legislative or judicial sanction and to give remedy against such usurpation when attempted. The main, if not the sole, purpose of these inhibitions was to place a salutary restriction on the powers of the government. It merely seeks to provide against any attempt by legislation or otherwise, to authorize, justify, or declare lawful any unreasonable search or seizure.

Section 98 of Chapter 43 of the Illinois State Bar Statutes, 1935, entitled "Dram Shops" provides, among other things, that no search warrant shall be necessary for the inspection or search of any premises licensed under the Act.

One has no absolute right to maintain a tavern or dram shop. He may only do so under certain conditions and restrictions which are within the legislative wisdom to impose. Thus a licensee accepts the burdens and restrictions imposed upon him by section 98 of chapter 43 of the Illinois State Bar Statutes, 1935, and recognizes its validity.

Launder v. Chicago, 111 Ill 291.

Schwuchow v. Chicago, 68 Ill 444.

A tavern being in the nature of a public place, the entry of the police officer into the tavern either in the guise of a patron or in his capacity as a police officer violates none of the constitutional guarantees of the tavern keeper.

Some States having the same constitutional provisions in relation to search and seizure as this State, even in the absence of a statute governing the same, have held that the seizure of instruments used in perpetrating

a violation of the law found in the public portion of a hotel, or other similar place, did not constitute an unreasonable search and seizure within the constitutional prohibition.

State v. Mausert, 95 Atl 991.

Van Hook v. Helena, 170 Ark 1083.

The pin game being placed in the public portion of the tavern open to view and any one entering the tavern having access to the same, a search was unnecessary. A search within the meaning of the Constitution implies invasion and quest and that implies some sort of force, great or small, actual or constructive.

The seizure of the machine was justified under the rule where one is charged with violating the law and any instrument or device found in his possession at the time of his arrest by means of which he accomplished the crime may be taken from him and used as evidence.

In answer to the last proposition as to whether the fact that the police officer was a party to the act constituted an entrapment, there is a very clear distinction between inducing a person to do an unlawful act and setting a trap to catch him in the execution of criminal designs of his own conception. It may therefore be stated, as a general rule, that if the criminal design originated with the perpetrator of the act he cannot escape conviction merely by reason of the fact that a police officer laid a trap or facilitated the execution of the scheme or that a police officer appeared to cooperate with the perpetrator in order that he might detect him in the act.

People v. Ficke, 343 Ill 367.

Andrews v. United States, 162 US 420.

The Supreme Court of Illinois in *People v. Ficke*, 343 Ill 367, at page 377 states:

"It is not an instigation or solicitation to crime for an individual or an officer of the law, having reason to believe that another is or others are committing or intending to commit or conspiring to commit criminal offenses, to furnish an opportunity for the commission of the criminal offenses which the persons concerned are committing or intending to commit. If the purpose is, in good faith, to secure evidence against persons guilty of crime, there is no merit in the claim that the person was entrapped into the commission of the crime and should therefore be relieved of criminal responsibility."

In the case before us the police officer saw a pin game machine in a tavern and, suspecting the owner of violating the ordinance by using it for gambling purposes, acted in good faith to secure evidence by furnishing an opportunity to the bartender to engage in a gambling transaction. These facts do not constitute entrapment under the law.

Thus the above arrest violated none of the constitutional rights of the defendant and the evidence secured was competent and admissible and, in our opinion, can be sustained in court upon proper presentation.

DESTRUCTION OF RECORD OF PERSON WRONGFULLY ARRESTED

(No. 9614—Commissioner of Police—C.P.H. and W.V.D.—
September 10, 1937—4 pp.)

The Commissioner of Police may not remove, mutilate, or destroy the record of arrest of a person who was held for a crime afterwards learned to have been committed by another. Public records and documents kept as required by law cannot be removed or destroyed for any reason by any one who happens to have them in custody or possession.

Citations:

Statute: IRS '37, 38: 401.

Ordinance: Code '31: 401.

Cases: Miller v. Gillespie, 196 Mich 423 (1917).

Bartletta v. McFeeley, 133 NJ Eq 67 (1933).

Matter of Molineux v. Collins, 177 NY 395 (1904).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of August 23, 1937, relative to a communication from * * * attorneys at law, * * * wherein they state that * * * one of the judges of the Municipal Court of Chicago * * * granted leave * * * to file a complaint charging C— V— with grand larceny; that Judge Curran * * * dismissed the cause for want of prosecution; and that the real culprit was apprehended and made restitution.

They request that the record of arrest of C— V— on the above charge be removed from the files of your department and you wish to be advised whether you have power to grant this request.

Please be advised that the Revised Chicago Code, 1931, article 5, section 294 provides:

"The commissioner of police shall cause to be kept books of records in the police department of persons arrested for offenses; * * *. He shall cause to be kept a complete record of all felonies committed within the city of Chicago, which records shall at all times be open to the inspection of the mayor and the members of the city council of the city of Chicago. Said records shall be classified as to the nature of the felonies committed, and shall be further classified by police precincts and by streets and numbers, by means of an appropriate index card, arranged alphabetically and according to the nature of the felonies committed."

The weight of authority is to the effect that public records and documents kept in the manner designated by law cannot be removed or destroyed for any reason by any one who happens to have them in his custody or possession.

In the case of *Miller v. Gillespie*, 196 Mich 423, it was sought to have a court of equity compel the police to surrender and cancel certain records, made pursuant to statute, of the arrest of one charged with embezzling certain personal property on which charge he was found not guilty. The court denied the release sought. The court said, page 428:

"The opinions in some of the cases I have cited exhaustively review the subject. None of them is authority for granting relief in the case at bar, unless it can be said that the mere preservation in the files of the police department of a report proper to be made in the first instance—a true report—exposes plaintiff to ridicule, obloquy, or disgrace. I am of opinion that it does not, and, without denying the jurisdiction of a court of equity to afford a remedy for a wrongful invasion of privacy, conclude that the plaintiff is not entitled to the relief asked for, and that the decree must be affirmed, without costs."

In the case of *Bartletta v. McFeeley*, 113 NJ Eq 67, it was held that a court of equity will not order the surrender of photographs, finger prints and measurements of one arrested by police on a criminal charge for which he was not later indicted. The court said, page 69:

"I am doubtful of the authority of this court to order an alteration of a record of the police department in the absence of proof that the record may be used to the injury of complainant. A precedent which might lead to the alteration or suppression of criminal complaints would be dangerous. Complainant's plight is not serious enough to induce the court to exercise the delicate power of ordering the record changed."

In the case of the *Matter of Molineux v. Collins*, 177 NY 395, it was held that mandamus will not lie to compel the superintendent of prisons to destroy or surrender a photograph, description, and measurement of one sentenced to a state prison, which the law requires the superintendent to secure and preserve, even though the prisoner's sentence is afterwards reversed and he is subsequently acquitted of the charge against him. The court said, page 399:

"While the courts can command the superintendent of prisons to do his duty, it is not his duty to give up a record made under the authority of a statute, and until the legislature makes it his duty to surrender the record in question it should remain in his custody, because the state put it there and has not authorized its removal. An innocent man accused of crime is sometimes compelled to make sacrifice and undergo suffering for the benefit of society. Like payment of taxes and service upon juries, it is part of the price paid for the privilege of living in a country governed by law."

Section 294 of the Code hereinbefore quoted provides that your department shall keep a record of all persons arrested for offenses and a complete history of each person charged with having committed a felony. There is no provision in the section that gives you expressed or implied authority to remove said records. Furthermore, under the provisions of the criminal code it is a crime for any public officer or any person whatsoever to withdraw, falsify or avoid any record belonging to any public office within this state. (Illinois Revised Statutes, 1937, chap. 38, para. 401.)

In view of the above it is our opinion that you do not have authority to remove, mutilate, destroy, cancel or obliterate any record of the arrest of C— V— on the aforesaid charge of grand larceny.

INSPECTION OF POLICE FILES BY PRIVATE PERSONS

(No. 9633—*Commissioner of Police—C.P.H.—October 8, 1937—3 pp.*)

The Commissioner of Police has no authority to advise a private company as to whether a certain person with whom they contemplate a business transaction has a criminal record or reputation for violating the liquor laws of the United States or any state. The City Council by ordinance has restricted access to the criminal records of the City, and the information contained in them, to the Mayor, members of the City Council, and members of the Police department.

Citations:

- Statutes: USCA, title 27, sec. 40a, para. a, b.
IRS '37, 38: 780g.
Ordinance: Code '31: 294.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of September 7, 1937, relative to two communications from the Bankers Commercial Corporation * * * wherein it appears that they are considering the making of a loan to B— G— and accepting as security therefor a mortgage on a motor vehicle.

Before entering into this agreement, they desire to comply with the provisions of the Federal laws pertaining to intoxicating liquors which provide that in any proceeding in court for the forfeiture of any vehicle seized for the violation of the internal revenue laws relating to liquors, the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves that he was informed, in answer to his inquiry at the headquarters of the Chief of Police in the locality in which the person from whom he acquired his interest resides, that such person has no record or reputation for violating the laws of the United States or any state relating to liquor. (United States Code Annotated, title 27, sec. 40a., para. a, b.)

They requested you to furnish them with information whether B— G— has a criminal record, and you desire to be advised whether it is your duty to grant their request.

Please be advised that there is no provision in the aforesaid section 40a of the United States Code Annotated which expressly or impliedly makes it your duty to furnish information relative to the criminal records of your department.

In the absence of a positive enactment, the common law rule is to the effect that every person is entitled to the inspection, either personally or by his agent, of public records, provided he has an interest therein, which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence of necessary information. The Revised Chicago Code of 1931, art. 5, sec. 294, provides as follows:

"The commissioner of police shall cause to be kept books of record in the police department of persons arrested for offenses * * *. He shall cause to be kept a complete record of all felonies committed within the City of Chicago, which records shall at all times be open to the inspection of the mayor and the members of the city council of the City of Chicago. Said records shall be classified as to the nature of the felonies committed, and shall be further classified by police precincts and by streets and numbers, by means of an appropriate index card, arranged alphabetically and according to the nature of the felonies committed. * * *"

It is apparent from the provisions of the aforementioned section 294 of the Code that the only persons who have access to the criminal records are the Mayor, members of the City Council and the members of your department.

The City Council in this instance has followed the public policy of the State, which policy is set forth in the act of the legislature in creating the State Bureau of Criminal Identification and Investigation. Illinois Revised Statutes, 1937, chap. 38, par. 780g., provides:

"No file or record of the bureau hereby created shall be made public, except as may be necessary in the identification of persons suspected or accused of crime and in their trial for offenses committed after having been imprisoned for a prior offense; and no information of any character relating to its records shall be given or furnished by said bureau to any person, bureau or institution other than as herein provided. Violation of this section shall constitute a misdemeanor."

In view of the foregoing, it is our opinion that you do not have authority under the law to advise the corporation whether or not * * * has a criminal record or reputation for violating the laws of the United States or any state relating to liquor.

CONFLICTING CLAIMS TO AUTOMOBILE HELD BY POLICE

(No. 9329—Commissioner of Police—C.N.—November 10, 1936
—2½ pp.)

The Department of Police should continue to keep in storage an automobile held by it as the result of the owner's death in

an accident until either of the present claimants (a loan company claiming title through a chattel mortgage and a department store claiming title to the tires as a conditional vendor) or both show a court writ of sufficient authority to protect the Department against subsequent claims.

The towing charge and any charges that may accrue for storage should be paid by the claimant who succeeds in establishing full title to the car.

OPINION OF FOREGOING SYNOPSIS

We have your letter of November 2, 1936, together with digest of communication from * * * and report by * * * Lieutenant of Police, requesting an opinion concerning conflicting claims to title of an automobile and accessories now at the Police Navy Pier garage.

It appears that the automobile came into your possession after having been towed from the scene of an accident by the * * * Garage. The owner of the automobile was killed in the accident. A representative of the Commonwealth Loan Company in possession of the deceased owner's registration title claims the car by virtue of a mortgage upon the vehicle. A representative of the Boston Store claims the tires on the car because of a conditional sales contract entered into upon purchase of the tires, evidently used to replace the set with which the car was originally equipped. There appears to be default both as to the mortgage covering the car and the conditional sales contract on the tires.

Because of the fact that no documents directly relating to the alleged mortgage on the car or the conditional sales contract on the tires is before us, this department cannot render a definite opinion as to the conflicting claims of ownership. It is highly probable that what the representative of the Commonwealth Loan Company termed a mortgage was in reality a conditional sales contract on the car. If the proper reservation of title were made in such a conditional sales contract, upon default by the purchaser the vendor would have full right to possession of the automobile, even though the failure to pay was due to the death of the purchaser. In conditional sales the title never passes until all conditions have been fulfilled. The major condition is usually payment of the purchase price in full plus such reasonable interest costs and carrying charges as may be agreed upon.

However, such a conditional sales contract would not serve to void a subsequent conditional sales contract made with a dealer in automobile accessories. As to whether the tires are deemed accessories readily removed or fixtures is a matter for judicial adjudication.

If the instrument conveying the automobile was a mortgage entered into upon purchase, not a conditional sales contract, the legal distinction would lie in the fact that title would remain in the purchaser until default. All details of notice, advertising, etc., required by chattel mortgage law would have to be complied with by the mortgagee.

Our advice is that because of the conflicting claims presented you should continue to keep the car in storage until either claimant or both can show a court writ of sufficient authority to protect you against subsequent claims. The adjudication as to one type of claim should include disposition of the other. The towing charge, together with any charges that may accrue for storage should be paid by the ultimate claimant who succeeds in establishing full title to the car.

TWO ASSIGNMENTS OF THE SAME PROPERTY

(No. 9126—*Commissioner of Police—M.D.S.—April 18, 1936—*
1½ pp.)

When two assignments of personal property are presented by different counsel to the Police Custodian for property seized from a person charged with murder, the Police Custodian should not honor either assignment until it has been determined who is entitled to the property assigned.

DISPOSITION OF ABANDONED AUTOMOBILE OF DECEASED PERSON

(No. 9296—*Commissioner of Police—A.C.—September 30, 1936—*
—3 pp.)

When a person domiciled in another county of the State was drowned off the shores of the City, and a public administrator was appointed for his estate in the county of his residence, and another public administrator was appointed in Wisconsin, both of which public administrators claim the deceased's abandoned automobile which is in the possession of the Police department, the Police department should turn the automobile over to the public administrator for the estate of the deceased in the county of his residence upon the presentation by that public administrator of a certified copy of his appointment and the payment of the storage fee.

Citations:

Statute: ISBS '35, 3: 18.

Case: Duple v. Follett, 304 Ill 166 (1923).

OPINION OF FOREGOING SYNOPSIS

An examination of the documents disclose that L— O— was drowned in Lake Michigan off of our shores on July, 1936. At that time, he was domiciled in Lockport, Illinois. He has a relative living in Riverside, Illinois, and another one in Sturgeon Bay, Wisconsin. Both of his parents are living in Norway. It appears that Mr. — was appointed administrator of the estate of the deceased in Sawyer, Wisconsin, and that * * * the Public Administrator of Will County was also appointed administrator of the estate of the deceased. The deceased has one creditor who resides in Will County, Illinois. An automobile belonging to the deceased was found abandoned on a public thoroughfare in the city of Chicago and is now in the possession of the Chicago Police department, and you request an opinion on who is entitled to the car.

The only question involved in this matter is which administrator shall get the automobile, and whether the Public Administrator of Will County has been properly appointed.

Chapter 3, section 18 of the Illinois State Bar Statutes, 1935, among other things, provides that the administration of the estate of all persons dying intestate shall go to relatives and the next of kin of the deceased, in the order listed therein, and if they do not so elect then to a creditor of the deceased or to the public administrator of the county.

Among other things, the above section of the Illinois Statutes was discussed in the case of *Dupee v. Follett*, 304 Ill 166, at page 169, where the court said:

"The statute contemplates the public administrator shall act when an intestate leaves property in this State and there is no relative or creditor within this State who will administer. If the deceased leaves relatives in this State who will administer, and they seek to do so before the public administrator is appointed, they have the right to do so. * * * The reason for creating the office of public administrator was to give authority to some one to administer on intestate estates where no relative or creditor would administer. * * * The office was created for the benefit of such estates, and if the heirs apply for letters of administration before application is made to commit the administration to the public administrator, although more than sixty days have expired since the death of the intestate, letters should be granted to them or to the persons they nominate. It was the clear intent of the legislature that relatives and creditors of the intestate should be preferred to the public administrator."

It is, therefore, our opinion that the automobile in question should be turned over to * * * the Public Administrator of Will County, Illinois, upon the presentation of a certified copy of his appointment and the payment of the storage fee.

DISPOSITION OF FOUND MONEY BELONGING TO UNKNOWN OWNER

(No. 9045—Chairman, Committee on Finance—E.L.M.—February 6, 1936—4 pp.)

When the City, through police routine, comes into the possession of a sum of lost money exceeding fifteen dollars, it should turn the money over to the County Treasurer or the rightful owner, not to the finder.

Citations:

Statute: ISBS '35, 50: 27, 28.

Case: People v. Cope, 345 Ill 287 (1932).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with council paper, reports from the City Comptroller and the Police department in the claim of P— E— for payment for money taken by the Police Custodian in the year 1930.

In a letter, hereto attached, addressed to the Committee on Finance (it is stated):

"P— E— was arrested on February 7, 1930, as a suspect in connection with some purse stealing episode. He was then ten years old. It was finally proved that he had picked up the purse in question and when found had on his person \$70.00. This sum was taken from him when he was arrested and was later turned over to the Custodian's Office. In due course, because no claim was made, the Custodian turned it over to the Comptroller or some other official, and of course has no further control over it at this time."

The report of the Police department, hereto attached, is as follows:

"The Custodian's record shows that on February 11th, 1930, the Custodian received from the 25th District under there (sic) inventory No. 37435, Custodian No. 77249, the sum of (\$70.00) seventy dollars in United States Currency, owner unknown. Recovered in street near curb at 4030 Madison St. by J— B— and P— E—, marked Held for Investigation, by Officer H— of the 25th District.

"The Custodian sent out form letter to Officer H— of the 25th District asking whether or not this money was needed for evidence if not same to be returned to owner and if no owner the money was to be turned over to the City Collector. His answer to the Custodian is as follows:

"The above money was taken from a Juvenile P— E—. He said that he found the money and owner of same cannot be found."

"On December 22, 1930, the Custodian turned over the (\$70.00) seventy dollars to the City Collector holding a receipt for same."

The laws of our State definitely provide for the disposition of lost money that has been found and the identity of the rightful owner cannot be ascertained. Sections 27 and 28, Chapter 50, Illinois State Bar Statutes, 1935, provide as follows:

"Sec. 27. If any person or persons shall hereafter find any lost goods, money, bank notes, or other choses in action, of any description whatever, of the value of \$5 and upwards, it shall be the duty of such person or persons to inform the owner thereof, if known, and to make restitution of the same, without any compensation whatever, except the same shall be voluntarily given on the part of the owner; but if the owner be unknown, such person or persons shall, within five days after such finding as aforesaid, take such goods, money, bank notes or other choses in action before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place when and where the same was found, that no alteration has been made in the appearance thereof since the finding of the same, whereupon the justice shall enter a description of the property thus found and the value thereof as near as he can ascertain, in his estray book, together with the affidavit of the finder, to be taken as aforesaid; and shall also, within ten days after the said proceedings shall have been entered on his estray book as aforesaid, transmit to the county clerk a certified copy thereof, to be by him recorded in his estray book, and to file the same in his office."

"Sec. 28. In all cases where such lost goods, money, bank notes or other choses in action shall not exceed the sum of \$15 in value, it shall be the duty of the finder to advertise the same on the door of the courthouse, and in three other of the most public places in the county, and if no person shall appear to claim and prove such money, goods, bank notes or other choses in action, within twelve months from the time of such advertisement, the right to such property, where the same shall consist in goods, money or bank notes, shall be vested in the finder; but if the value thereof shall exceed the sum of \$15, it shall be the duty of the county clerk, within twenty days from the time of the reception of the justice's said certificate at his office, to cause an advertisement to be set up on the court-house door, and in three other of the most public places in the county, and also a notice thereof to be published for three weeks successively in some public newspaper printed in this State; and if the said goods, money, bank notes, or other choses in action, be not reclaimed within six months after the advertisement thereof as aforesaid, it shall be the duty of the finder, if the property shall consist in money or bank notes, to deliver the same to the county treasurer, after deducting the necessary expenses, hereinafter provided for * * *."

The Illinois Supreme Court in October, 1931, referring to the sections of the statute quoted above, said:

"The sections mentioned refer to the duty of the taker-up of estrays or finder of lost property to take the action required by the statute to notify the owner and to the method by which such estrays or lost property, if not reclaimed by the owner, may be sold and the proceeds paid into the county treasurer. * * *" (*People v. Cope*, 345 Ill 287.)

The fact that the \$70.00 involved in the claim herein being considered was found in the street by a ten-year-old boy and came into the possession

of the City in the course of police routine, and that the owner of the money is unknown, does not appear to be disputed.

The statute very definitely provides that where the sum of money so found is less than \$15.00 and is still unclaimed by the owner the right to the money shall vest in the finder within one year after the requirements of the statute to find the owner have been complied with and just as definitely provides that where the sum of money so found is more than \$15.00 and is unclaimed by the owner the right to such money vests in the county treasurer.

After considering all the circumstances through which the City came into possession of this money it appears to us that the City is in the position of a finder of "lost goods or money" and in the disposition thereof should be governed by the statute. We are of the opinion, therefore, that the City has no right to deliver the \$70.00 claimed by P— E— to any person other than the rightful owner or the treasurer of Cook County.

SPECIAL POLICEMEN FOR TRUCKING COMPANY

*(No. 9150—Commissioner of Police—C.P.H.—May 6, 1936—
2½ pp.)*

The Commissioner of Police has authority, by ordinance, to appoint special policemen for a trucking company which is a common carrier.

Citations:

Ordinance: Code '31: 3751.

Case: Henchliffe v. Wenig Teaming Co., 274 Ill 417 (1916).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of April 29, 1936, wherein you state that the Keeshin Motor Express Co., Inc., * * * has requested the secretary of your department to appoint two men as special policemen, and you ask our opinion whether it is lawful for you to grant this request.

The records of the Recorder of Cook County, corporation record No. 675, pages 70 and 71, show that the above company is an Illinois corporation organized to conduct a general freight, transportation and storage business for the moving, storing and transferring of freight and property in Illinois and adjoining states and to own and operate motor vehicles and airplanes for that purpose and to acquire all property and rights therefor.

In the case of *Henchliffe v. Wenig Teaming Co.*, 274 Ill 417, page 422, the court said:

"All persons who undertake for hire to carry the goods of another are either private or common carriers. Private carriers, like ordinary bailees for hire, are liable only for injury or loss of the goods intrusted to them when it results from the failure of themselves or their servants to exercise ordinary care. Common carriers are liable, as insurers, for all injuries or loss not resulting from the act of God or the public enemy. (4 RCL 549.) While it has sometimes been doubted whether cartmen or truckmen employed to carry goods from one part of the city to another are to be regarded as common carriers, it is a general rule that when they undertake to carry goods for hire for the public generally and as a common employment in the city they are common carriers. (*Parmelee v. Lowitz*, 74 Ill 116; 4 RCL 557, and cited cases.)"

As one of the objects and purposes of this corporation is the carrying of goods of others for hire, it is our opinion in view of the above decision that the Keeshin Motor Express Co., Inc., is a common carrier and comes within the purview of Section 3751, article 33 of the Revised Chicago Code of 1931, which provides:

"*Special policemen—appointment on application of common carrier—badge.*) The commissioner of police shall also have power, on the application of the proper officer of any common carrier, to appoint and swear in any number of special policemen to do special duty at any and all necessary places in the city of Chicago for the protection of persons, passengers and property being transported in interstate or intrastate commerce within the city, and the protection of its property within the city, at the expense and charge of the person or corporation by whom the application is made. Any person who is an applicant for appointment as a special policeman for a common carrier shall appear in person for examination at such place or places and at such time as may be designated by the commissioner of police, for examination as to his qualifications for such position.

"Such special policeman shall wear such badge or star as shall be designated by the commissioner of police, who shall issue a certificate of appointment to any such special policeman as may be appointed by him for any common carrier."

It is therefore our opinion that you have authority to appoint two men as special policemen for the Keeshin Motor Express Co., in accordance within the provisions of the above ordinance.

BOND FOR SPECIAL POLICEMAN

(No. 9473—Commissioner of Police—W.V.D.—April 1, 1937—
1½ pp.)

The requirement that a bond of one thousand dollars be filed by an applicant for appointment as a special policeman does

not require that this bond be executed by an indemnity company. However, the filing of any bond other than the bond of an indemnity company would require an investigation of the financial responsibility of the persons executing the bond and their power to execute the bond.

Citation: Code '31: 3755.

SPECIAL POLICEMAN FOR MORE THAN ONE LOCATION

(No. 9500—*Commissioner of Police—W.V.D.—April 22, 1937*
—1½ pp.)

Persons commissioned as special policemen possess all the powers of regular policemen, but the place where those powers are to be exercised must be definitely and clearly circumscribed.

It is within the discretion of the Commissioner of Police to determine whether one commission for a special policeman shall suffice for more than one location, but if a commission is issued for more than one location, each place should be definitely described in the commission.

Citation: Code '31: 3744.

C. THE BOARD OF HEALTH

APPOINTMENT OF MEMBERS OF PRIVATE CORPORATION'S MEDICAL STAFF AS DEPUTY HEALTH OFFICERS

(No. 9499—*President, Board of Health—R.N.—April 21, 1937*—
1½ pp.)

The appointment of members of the medical staff of a private corporation as deputy health officers of the City to vaccinate the employees of the corporation on the corporation's premises is unauthorized by law except in cases of epidemic or like emergency.

ENFORCEMENT OF HOSPITAL LICENSING ORDINANCE

(No. 9458—*President, Board of Health—M.J.M.—March 16, 1937—4½ pp.*)

The Board of Health is charged with the responsibility of closing a hospital which does not comply with the Revised Chicago Code of 1931.

Inasmuch as the sections of the Revised Chicago Code of 1931 pertaining to the licensing of hospitals specifically require compliance with the regulations of the Department of Buildings and the Bureau of Fire Prevention, and as those sections make the President of the Board of Health the recommending official for a license, he should not approve an application for a hospital license until the applicant has complied with all the provisions of the pertinent sections of the Revised Chicago Code of 1931 and the requirements of the Department of Buildings and the Bureau of Fire Prevention.

Citations:

Ordinances: Code '31: 2294-97, 2303, 2315.

Other reference: Opinion No. 9167 (this volume, p. 31).

OPINION OF FOREGOING SYNOPSIS

Your communication of March 10, 1937, states that the North Chicago Hospital at 2551 N. Clark street has no license to operate because of noncompliance with the municipal code in respect to matters of health and matters coming under the jurisdiction of the Department of Buildings, and that a question has arisen as to the responsibility of the City in case of an accident involving personal injury or death occurring in connection with the hospital. You ask our opinion upon the following questions:

"1. Whose responsibility is it to close the hospital when violations occur of provisions of the ordinance within the jurisdiction of two or more departments, such violations serving to prevent the hospital from securing a license?

"2. If the hospital shall, in the future, comply with the requirements of the Board of Health, should the Board approve the license application or refuse approval until such time as violations coming within the jurisdiction of other departments have also been corrected?"

The following sections of the Revised Chicago Code of 1931 are pertinent to your inquiries:

Section 2294 which makes it unlawful for any person other than the regularly constituted authorities of the United States, the state of Illinois, the county of Cook, or the city of Chicago to open or maintain any hospital within the corporate limits of the City without first obtaining a license.

Section 2295, the application section, which provides for the making of written application to the Commissioner of Health.

Section 2296 which states that the building or buildings used or to be used as a hospital shall comply with the requirements of the Department of Buildings and Bureau of Fire Prevention.

Section 2297 which makes it the duty of the Commissioner of Health to make, or cause to be made, strict inquiries into the facts set out in the application and when all laws, rules and regulations concerning the management and control of such hospitals have been complied with to recommend to the Mayor that a license be issued.

Section 2303 which provides for the creation of a Hospital Building Board, composed of the Commissioner of Health, the Commissioner of Buildings and the Chief Fire Prevention Engineer, said Board to meet upon call of the Commissioner of Health and to make recommendations to the City Council as it may deem necessary or expedient for the construction and erection of new hospital buildings and for changes in buildings now being used or which may hereafter be used for hospital purposes.

Section 2315, the penalty section, which provides for the imposition of a fine upon any person opening or maintaining a hospital without first having obtained a license therefor and which provides that in the event of a conviction of any person for a violation of any of the provisions of the ordinance relating to the safety and accommodations of the patients, it shall be the duty of the Commissioner of Health, and he is authorized and empowered to close such hospital, and to cause its vacation pending the repairs, alterations or additions necessary to make it safe and proper for the occupancy of its inmates and to make it comply with the terms of the ordinance.

From the above it will be seen that the regulation of hospitals heads up in the Board of Health. In an opinion given you May 19, 1936, the Law department expressed the view that supervision over hospitals was given to the Board of Health whose duty it was to take all necessary action to the end that ordinance requirements be met.

It should be noted that section 2297 makes the Commissioner of Health (now President, Board of Health) the license recommending official; also that, while section 2296 prescribes that a hospital building shall comply with the requirements of the Department of Buildings and Fire Prevention bureau, it does not prescribe that the application shall be approved by the heads of these departments. Obviously an application for a hospital license should not be approved unless the requirements of the Building department and Fire Prevention bureau are met. It is assumed that before formally approving an application the activities of the Board of Health, the Department of Buildings and the Fire Prevention bureau would be coordinated and that you would receive assurances that the provisions of the building code and fire prevention ordinances are complied with.

In harmony with the views expressed in the above mentioned opinion of May 19, 1936, and in answer to your first question our opinion is that the Board of Health is charged with the responsibility to close a hospital which does not comply with ordinance requirements. There is, of course, no

reason why you should not utilize the services of the Hospital Building Board created by section 2303 of the Code and receive full cooperation and assistance from the Department of Buildings and the Bureau of Fire Prevention in discharging the Board of Health's responsibility.

Answering your second question, inasmuch as the ordinance specifically requires that a hospital shall comply with the requirements of the Department of Buildings and Bureau of Fire Prevention and as you are the recommending official our opinion is that you should not approve the application for a hospital license until all of the provisions of the ordinance, including the requirements of the Department of Buildings and those of the Bureau of Fire Prevention have been complied with.

PROSECUTION OF LICENSE VIOLATIONS

(No. 9167—President, Board of Health—M.H.F.—May 19, 1936—2½ pp.)

When the Board of Health has knowledge of ordinance violations by a laboratory, dispensary, hospital, home, or nursery under its supervisory jurisdiction, which violations are detrimental to health or life, it should prosecute the institution, and not wait for the Bureau of License, which has no knowledge of the seriousness of the situation, to prosecute for failure to obtain a license.

The department having supervision over an establishment subject to license is not relieved from responsibility when it merely disapproves an application for a license and returns the application to the City Collector.

Citation: Code '31: 2275-2351.

OPINION OF FOREGOING SYNOPSIS

Your communication of May 12, 1936, invites our attention to section 2909 of the Revised Chicago Code of 1931 and you state that it has been the practice of your department to return license applications of homes, hospitals and day nurseries to the City Collector when such institutions do not comply with City ordinances. You further state that it has been your opinion that it was the duty of the City Collector to take action against these institutions, although recently you have been informed by the City Collector's office that if institutions are operating in violation of City ordinances it is the duty of the department concerned to take action. Our opinion is requested as to the proper procedure to be taken against institutions which are not licensed and which are still operating.

Our understanding of chapter 45 of the Revised Chicago Code of 1931 is that, subject to the exceptions stated in the chapter, it is unlawful to establish, maintain or operate a laboratory, dispensary, hospital, home, or nursery within the City, without first obtaining a license therefor and paying the prescribed license fee. In case any person violates any one of the ordinances found in the chapter by operating one of the establishments named without a license he is subject to prosecution and fine under the penalty section thereof.

It is the duty of the Bureau of License to ferret out those persons subject to license who have not procured licenses and to prosecute them for failure to procure the same. However, the Bureau of License, and the City Collector as well, are primarily interested in the revenue phases of license ordinance enforcement. In our opinion, the department having supervision over the establishment subject to license is not relieved from responsibility when it merely disapproves an application and returns the same to the City Collector.

Under the municipal code the Board of Health is given supervision over the institutions mentioned in your communication. If an institution subject to regulation and license under the provisions of chapter 45 of the Code is operating in violation thereof we regard it to be the duty of the Bureau of License to prosecute the institution for operating without a license. If the institution has applied for a license and has not received one because its application has been disapproved for noncompliance with some regulatory provision, our opinion is that it devolves upon your board to take the action necessary to compel compliance. Should your inspection made under an application for a license reveal nonconforming conditions which are sufficient to require you to disapprove the application and the applicant operates on a Collector's receipt for the deposited fee, your board should either prosecute the offender for violating the ordinance provisions or initiate action to close the institution. Where the Board of Health has knowledge of ordinance violations in institutions under its supervisory jurisdiction, which violations are detrimental to health or life, it does not appear to us that action to correct or abate the offending conditions should wait until the Bureau of License, having no knowledge of the seriousness of the situation, gets around to prosecute only for failure to secure licenses.

EXAMINATION AND TREATMENT OF VENEREALLY DISEASED PERSONS

*(No. 9597—President, Board of Health—W.V.S.—August 19,
1937—12 pp.)*

The Board of Health, under the rules of the State Department of Public Health as adopted by the Board and decisions of the courts, has the power to demand that persons reasonably sus-

pected of being infected with a venereal disease be examined, and to require treatment of those persons found to be infected. "Reasonably suspected" requires the existence of such facts as would cause a reasonable man to suspect the presence of a venereal disease.

Citations:

- Statute: Vernon's Texas Statutes (1916), art. 4445, sec. 3.
Cases: Ex parte Dayton, 199 Pac 548 (Cal. App., 1921).
Ex parte Clemente, 215 Pac 698 (Cal. App., 1923).
Ex parte Arata, 198 Pac 814 (Cal. App., 1921).
Rock v. Carney, 185 NW 798, 22 ALR 1178 (Mich., 1921).
Ex parte Company, 139 NE 204 (Ohio, 1922).
Ex parte McGee, 185 Pac 14, 8 ALR 831 (Kan., 1919).
Dowling v. Harden, 88 So 217 (Ala. App., 1921).
Ex parte Brooks, 212 SW 956 (Tex. Crim. App., 1919).

Other references: State Department of Public Health, Rules and Regulations for the Control of Communicable Diseases, rule 14, 16, 17.

OPINION OF FOREGOING SYNOPSIS

In accordance with the request which you made in your letter of August 13, 1937, we have investigated the pertinent statutes, regulations and decisions concerning, first, the power of the Board of Health to compel examination for venereal diseases, and, second, the power of the Board of Health to require treatment for persons infected with venereal diseases.

1. *The Power of the Board of Health to Compel Examination for Venereal Diseases*

The power of health officers to order compulsory examinations of suspected persons to determine whether or not they are afflicted with venereal diseases, either under express provisions of health statutes or regulations or under general quarantine powers, has been discussed in numerous cases. Perhaps the cases most clearly showing the existence of the power of a health officer to compel a physical examination are *Ex parte Dayton*, 199 Pac 548 (Cal. App., 1921), and *Ex parte Clemente*, 215 Pac 698 (Cal. App., 1923). In these cases applications were made for writs of habeas corpus after the petitioners had been arrested and held for examination by the health officer. No examinations had been made when the cases were decided and the right of the health officer to detain the petitioners until they should submit to examination was squarely presented. The right was sustained without discussion since it appeared that reasonable ground existed in each case for suspecting that the petitioners were afflicted with venereal disease.

In *Ex parte Arata*, 198 Pac 814 (Cal. App., 1921), the court said, page 816:

"That the health authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are

afflicted with infectious or contagious diseases * * *, as a general right, may not be questioned. It is equally true that in the exercise of this unusual power, which infringes upon the right of liberty of the individual, personal restraint can only be imposed where, under the facts as brought within the knowledge of the health authorities, reasonable ground exists to support the belief that the person is afflicted as claimed; and as to whether such order is justified will depend upon the facts of each individual case."

Rock v. Carney, 185 NW 798, 22 ALR 1178 (Mich., 1921), was a case of false arrest and assault and battery brought against a health officer. Plaintiff, a girl of eighteen, was apparently arrested and examined upon the order of the defendant. She was found to be diseased and was sent to a State institution to be treated. Upon her release she brought suit. The trial court directed a verdict for defendant at the close of plaintiff's evidence. Concerning the right of the defendant to make the examination, the court said, 22 ALR 1189:

"Dr. Carney had the power to make the examination, but he could not exercise such power unless he had reasonable grounds to believe the plaintiff was infected. Such good faith on his part was a necessary prerequisite to the exercise of the power. I am unable to follow the contention of defendants' counsel that this record establishes such good faith. Dr. Carney was not sworn as a witness, and it did not appear from any testimony introduced in the case that he had any information with reference to plaintiff, her habits, or her conduct, which would give him reasonable grounds to believe that she was infected with either of the diseases named. In the absence of such testimony, I think the trial judge was in error in directing a verdict for defendant Carney. What information defendant Carney had was within his own knowledge and not within the knowledge of the plaintiff."

In *Ex parte Company*, 139 NE 204 (Ohio, 1922), the court dismissed rather summarily the contention that a regulation of the Sanitary Code of the Department of Health, providing for compulsory examination of persons reasonably suspected of having venereal diseases, violated constitutional rights. This case is significant because the relatrix was found not guilty of prostitution; she was, however, found to be afflicted with venereal disease when she was taken into custody by the health officer upon her release from jail. After citing cases dealing with the extent of the police power, the court said, page 206:

"The regulations here under consideration, if otherwise lawful, are not in conflict with the federal or State constitutions."

In *Ex parte McGee*, 185 Pac 14, 8 ALR 831 (Kan., 1919), the court decided that the reasonableness of health regulations providing for examination of persons reasonably suspected of having a venereal disease was not involved, but nevertheless said concerning these regulations, page 835:

"* * * Reasonableness of provisions relating to discovery and to examination of suspects need not be determined. It may be observed, however, that while provisions of the latter class cut deeply into private personal right, the subject is one respecting which a mincing policy is

not to be tolerated. It affects the public health so intimately and so insidiously that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril. Only those invasions of personal privacy are unlawful which are unreasonable, and reasonableness is always relative to gravity of the occasion. Opportunity for abuse of power is not greater than in other fields of governmental activity, and misconduct in the execution of official authority is not to be presumed."

In *Dowling v. Harden*, 88 So 217 (Ala. App., 1921), the petitioner applied for habeas corpus to bring about her release from detention by the health officer after she had been released on bond upon a charge of vagrancy. The court said, page 217:

"The right of the Legislature, under the police power to establish quarantine, to prevent the spread of contagion and infection, is too well established by adjudication and grounded in common sense to be questioned or doubted, and governmental agencies, when authorized, may enact and enforce all reasonable ordinances necessary to attain the desired results. To that end persons affected or reasonably suspected of being affected with diseases known to be infectious or contagious may be segregated, or isolated from the public, either in their homes, or in hospitals or camps prepared for that purpose, until such times as that they will cease to be a menace to the public, and prisoners under legal charges of crime may be, when so affected, segregated from their fellows. When so quarantined, they are subject to such reasonable examination as is necessary to satisfy the health authorities that their release will not endanger the public."

Enough has been said to show that power may validly be conferred upon a health officer to order the compulsory examination of persons *reasonably suspected* of having venereal diseases. Other cases involving this question either directly or indirectly are:

Ex parte Brown, 172 NW 522 (Neb., 1919)

Ex parte Fisher, 239 Pac 1100 (Cal. App., 1925)

Duncan v. City of Lexington, 244 SW 60 (Ky. App., 1922)

State ex rel. McBride v. Superior Court, 174 Pac 973 (Wash., 1918)

Wagg v. Griffin, 170 NW 400, 2 ALR 1327 (Iowa, 1919)

Ex parte Rothrock, 199 Pac 581 (Okla. App., 1921)

Ex parte Brooks, 212 SW 956 (Tex. Crim. App., 1919)

The power of compulsory examination in Illinois is found in the Rules and Regulations for the Control of Communicable Diseases, adopted by the State Department of Public Health and subsequently by the Board of Health of the city of Chicago. The pertinent provisions are contained in rule 16, which reads:

"Rule 16. *General Duties of Local Health Authorities*: In addition to the other duties prescribed by these rules, the local health authority shall: * * *

"(c) Make examinations of persons reasonably suspected of suffering from venereal diseases. (Owing to the prevalence of such diseases

among prostitutes and persons associated with them, all such persons may be considered as suspects.)

"(d) Examine known or suspected prostitutes when committed to or detained in any calaboose, police station or jail to ascertain the existence of any venereal disease and, if any such person is found to be suffering from a venereal disease, to quarantine such person until it is definitely ascertained that quarantine may be terminated in accordance with RULE 14-(d). * * *

"(f) Cooperate with officials, whose duty it is to enforce laws against prostitutes, and otherwise use any justifiable and legal means for the suppression of prostitution.

"Any person known to be a common prostitute or any inmate of a house of ill fame or any man consorting with a common prostitute or inmate of a house of ill fame caught in bed with or in the bedroom of a common prostitute or inmate of a house of ill fame, shall be regarded as a suspected case of venereal disease. If any such person, reasonably suspected by the health authority of being infected or being an infective carrier of any of the said diseases refuses to submit to examination, such refusal shall be considered *prima facie* proof that such person is so infected and shall authorize the local health authority to carry out measures of quarantine and isolation of such person and the placarding of the premises by the local health authority.

"Such persons as have been examined and found not to be suffering from venereal disease, may by order of the local health authority be detained for a time equal to the period of incubation. * * *

It will be noted that the condition upon which the power of compulsory examination exists is that the person to be examined is "reasonably suspected" of having a venereal disease. There is little to be gained from the decided cases in determining precisely what is a reasonable suspicion. As in any other field of law involving the concept of "reasonableness," the standard will undoubtedly be the existence of such facts as would cause a reasonable man to suspect the presence of venereal disease, and whether or not particular facts give rise to a reasonable suspicion will not be predictable with certainty until the course has been more definitely charted by judicial decisions.

The most complete discussion of what constitutes a reasonable suspicion is contained in *Ex parte Arata*, 198 Pac 814 (Cal. App., 1921), in which the court said, page 816:

"* * * Where a person so restrained of his or her liberty questions the power of the health authorities to impose such restraint, the burden is immediately upon the latter to justify by showing facts in support of the order. It might be proved, for instance, that the suspected person had been exposed to contagious or infectious influences; that some person had contracted such disease from him or her, as the case might be. Such proof would furnish tangible ground for the belief that the person was afflicted as claimed. And we wish here to emphasize the proposition, which is unanswerable in law, that a mere

suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.

"Coming then to a case where it is claimed that the person suspected is one whose habits are such as to warrant the belief that they are afflicted with a venereal disease: We may agree that in cases of persons who commit acts of prostitution—that is, acts that are commonly understood to fall within the 'commercial vice' definition—such a majority of them may be afflicted with infectious venereal disease as to justify the health department in enforcing the preliminary quarantine measures as here shown against any such; in other words, that, based upon the experience of the health authorities as it is stated to be in the return, it is reasonably probable that a person found to be of the class mentioned is so infected with such disease. The presumption which this statement allows to be made as against the individual in the first instance has its foundation in the fact that women of ill fame, by the very nature of their occupation, indulge in repeated and promiscuous acts of sexual intercourse. We have held heretofore (*Ex parte Dillon*, 186 Pac. 170) that this inference which the health authorities seek to draw was not a fairly reasonable one to be deduced under proof of sexual acts between individuals charged under an ordinance of the city of Los Angeles forbidding intercourse between unmarried persons, which ordinance had as its intent the prevention of hotels and lodging houses being resorted to for such purpose. The distinction that is suggested between the two classes of cases is apparent and requires no argument to illustrate the reason for it. * * *

The evidence upon which a writ of habeas corpus was denied in *Ex parte Clemente*, 215 Pac 698 (Cal. App., 1923), is thus stated in the opinion:

" * * * Upon the hearing the testimony showed that the petitioner had been arrested and charged with conducting a house of ill fame. Two police officers of the city of Los Angeles testified that they visited the house of the petitioner on the day of her arrest, and of the acts, and conduct of petitioner on this occasion. There was also testimony to the effect that the reputation of petitioner's house was that of a house of ill fame. This information had all been furnished to the health department, and upon it the department made its order for the examination of petitioner and for her detention until she should submit to such an examination. Repeated demands had been made of petitioner by the health department that she submit to the required examination, all of which had been refused by her.

"We are satisfied that the testimony produced at the hearing warranted the conclusion that the house conducted by petitioner was a house of ill fame, that she was an inmate thereof, and personally participated in the unlawful acts carried on therein. The health department having this information was, in our opinion, justified in its detention of the petitioner. This information furnished reasonable ground to believe that the petitioner was affected with the kind of disease referred to, and this, in view of two recent decisions of this

court, was all that was necessary to have authorized the health department to enforce quarantine measures against the petitioner. In re Dayton 52 Cal. App. 635, 199 Pac. 546, and In re Arata, 52 Cal. App. 380, 198 Pac. 814."

In re Dayton, 199 Pac 548 (Cal. App., 1921) is to the same effect.

In the light of these decisions it appears that the presumption contained in rule 16 of the Illinois Department of Public Health, to the effect that prostitutes and persons associated with them may be considered as persons reasonably suspected of suffering from venereal diseases, is valid. A similar provision is contained in the Statutes of Texas (Vernon's Texas Statutes, 1936, article 4445, section 3).

2. The Power of the Board of Health to Require Treatment for Persons Infected With Venereal Diseases.

It is apparent from the cases cited that, at least in the case of known prostitutes, the right exists to detain afflicted persons until the venereal disease from which they are suffering is cured or rendered non-infectious. In some of the cases, however, there is a suggestion that more moderate measures should be employed if it appears that the afflicted person will so conduct himself as not to cause the infection of others and will continue medical treatment. For example, in *Rock v. Carney*, 22 ALR 1178 (Mich., (1921) the majority opinion said, page 1181:

"* * * I have been unable to lay my finger upon any statute authorizing, or even sanctioning by inference, the procedure here adopted. I recognize the need of full power to stay the spread of epidemic diseases, and I find such power in the statute; but I cannot find there that, by the mere determination that a disease is dangerous and communicable, there follows power at the will of the health officer to refuse isolation in the home by quarantine and placard notice thereof, and to commit the diseased person to a hospital. * * *"

In *Ex parte Company*, 139 NE 204 (Ohio, 1922), the court in discussing the case of a woman who was acquitted of a charge of prostitution, but found to be afflicted with a venereal disease, said on page 206:

"* * * Quarantine in the sense herein used means detention to the point of preserving the infected person from contact with others. The power to so quarantine in proper case and reasonable way is not open to question. It is exercised by the state and the subdivisions of the state daily. The protection of the health and lives of the public is paramount, and those who by conduct and association contract such disease as makes them a menace to the health and morals of the community must submit to such regulations as will protect the public. * * *"

In *Ex parte Brooks*, 212 SW 956 (Tex. Crim. App., 1919), the afflicted person was a married woman with four children who refused to live at home, stating that she preferred a life of the streets. Concerning the right to confine her for treatment the court said, page 957:

"* * * We think the provision of said act that such patients should be confined for treatment until declared cured by official pronouncement is not unreasonable, unjust, or arbitrary. Our attention is not called to any authorities holding this or other similar acts violative of any of the provisions of our Constitution, or discriminatory, arbitrary, or unreasonable. * * *"

The pertinent provisions of the rules of the Department of Public Health of Illinois upon the subject of quarantine of persons afflicted with venereal diseases are:

"Rule 14. *Rules for Isolation, Control and Quarantine:* Cases of venereal disease in an infective stage are subject to the following:

- (a) The local health authority shall define the limits of the area in which the diseased person and his immediate attendant are to be isolated. No person other than the attending physician shall enter or leave this area without permission from the local health authority. All possible routes or avenues of infection must be closed. * * *
- (b) No prostitutes, suspected prostitutes or habitual associates of prostitutes or other persons under quarantine or isolation shall be released from quarantine until the local health authority has determined that such persons are no longer infective by laboratory and clinical tests and the premises have been disinfected at the discretion of the local health authority. * * *

"Rule 17. *Placarding:* The following premises may be placarded by or on order of the local health authority:

- (c) * * * Premises that have been placarded shall be regarded as under quarantine and such quarantined premises shall be subject to reasonable rules regarding its occupancy by persons other than the infective person. The disinfection of articles in the house shall be carried out to such extent as the local health authority may deem necessary.

Cases under treatment may be released from the provisions of this rule and other rules relating to quarantine, isolation and placarding at the discretion of the local health authority.

This officer should be guided in thus releasing a patient from quarantine upon the patient's promise (and any other favorable evidence) that the patient will continue treatment until non-infective and will observe proper precautions to prevent the spread of the disease to others. The same rule shall apply in a consideration of infective carriers and suspected contacts who are detained in isolated quarters.

Persons so released must satisfy the local health authority at weekly intervals that they are under the care of a physician.
* * *

In our opinion the Board of Health of the city of Chicago has the power to demand that persons reasonably suspected of being infected with a venereal disease be examined, and also has the power to require treatment for those persons found to be infected.

POWER OF BOARD OF HEALTH TO ORDER EMERGENCY DESTRUCTION OF IMPOUNDED DOGS

(No. 9235—*President, Board of Health*—July 16, 1936—R.N.—
2 pp.)

The Board of Health may not declare by a rule or regulation that an emergency exists due to lack of space for impounding stray dogs, and that stray dogs shall be destroyed within twenty-four hours after being impounded, as the Revised Chicago Code of 1931 specifies that five days must elapse from the time of impounding before a stray dog may be destroyed. The emergency may be taken care of either by an amendment to the Revised Chicago Code of 1931 or a temporary ordinance.

Citation: Code '31: 3962.

PERMIT FOR DISPOSAL OF PART OF BODY AND FOR STILLBIRTH BURIAL

(No. 9285—*President, Board of Health*—M.D.S.—September 15,
1936—2½ pp.)

A permit may be issued for the disposal of an amputated leg, arm, or other part of a body without a death certificate being presented.

A permit for the burial of a stillbirth not advanced to the fifth month of uterogestation may be issued by the local registrar without requiring the filing of a stillbirth certificate.

Citations:

Statute: ISBS '35: 65a: 17.

Ordinance: Code '31: 2182.

OPINION OF FOREGOING SYNOPSIS

Your communication of August 22nd, 1936, asking whether or not a death certificate is necessary to the issuance of a permit to dispose of an amputated arm, leg, or any other part of a body has been received.

In your communication you set out section 2182 of the Revised Chicago Code of 1931 in full. It is to be observed that the first part of section 2182 deals with permits generally, and that the second part of the same section

makes it mandatory that a proper death certificate shall be presented before a permit shall issue for the removal, interment, cremation, or disposal of a dead body. Inasmuch as this section makes a death certificate a condition precedent to the obtaining of a permit to bury a dead body and does not require the same in order to obtain a permit to dispose of a part of a body, it is our opinion that a permit may be issued for the disposal of an amputated leg, arm or other part of a body without a death certificate being presented.

You also request a ruling as to whether a permit may be issued for the burial of a stillbirth which has not advanced to the fifth month of uterogestation without a stillbirth certificate being presented.

Section 6 of an act entitled "An Act to provide for the registration of all births, stillbirths and deaths in the state of Illinois, and to repeal an act entitled, 'An Act requiring reports of births and deaths, and the recording of the same, and prescribing a penalty for noncompliance with the provisions thereof, and repealing certain Acts therein named,' approved May 6, 1903, in force July 1, 1903." (Chapter 65a, Illinois State Bar Statutes, 1935) provides:

"That a stillborn child shall be registered as a stillbirth and certificate of stillbirth shall be filed with the local registrar in the same manner as required for a certificate of death. Provided, that a certificate of stillbirth shall not be required for a child that has not advanced to the fifth month of uterogestation * * *"

This act thus makes a distinction between stillbirths under five months uterogestation and stillbirths over that period of time.

The city of Chicago comprises one of the local registration districts of the state of Illinois and it is the duty of the local registrar to enforce both State and local laws. Inasmuch as there are no provisions relating to stillbirths in the municipal ordinances it becomes necessary to apply the State law in reference thereto. Therefore, as a stillbirth certificate is not required by the State law in order to bury a stillbirth not advanced to the fifth month of uterogestation, a permit for the burial of such stillbirth may be issued by the local registrar without requiring the filing of a stillbirth certificate.

PERMIT FOR DISPOSAL OF AMPUTATED PART OF A HUMAN BODY

(No. 9471—President, Board of Health—R.N.—March 31, 1937
2½ pp.)

A permit must be obtained from, and issued by the Board of Health for the removal, burial, or cremation of an amputated arm, leg, or any other part of a human body.

Citations:

Ordinance: Code '31: 2182.

Other reference: Opinion No. 9285 (this volume, p. 40).

BIRTH CERTIFICATE OF ILLEGITIMATE CHILD

(No. 9127—M.D.S.—April 18, 1936—2 pp.)

An illegitimate child may be registered with the name of its mother and the name of the reputed father if done with their consent.

Citation: ISBS '35, 65a: 29, 37.

FRAUDULENT BIRTH CERTIFICATE

(No. 9611—President, Board of Health—M.D.S.—September 9, 1937—3½ pp.)

Whenever the President of the Board of Health shall have any doubts as to the genuineness of any birth certificate, it is his duty under the statute immediately to notify the State Board of Health.

The filing of a birth certificate which contains false statements violates the Revised Chicago Code of 1931. A doctor who has filed a fraudulent certificate should be required to file a new certificate or to amend the old certificate so that its statements will be true.

Citations:

Statute: Birth Registration act, sec. 1, 3, 4, 22.

Ordinances: Code '31: 2178, 2198.

OPINION OF FOREGOING SYNOPSIS

Your communication relative to the birth certificate of D— H— has been received.

Please be advised that section 1 of an act to provide for the registration of all births, stillbirths and deaths in the state of Illinois provides as follows:

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the State Board of Health shall have charge of the registration of births, stillbirths, and deaths throughout the State. The said board shall be charged with the uniform and thorough enforcement of the Act throughout the State, and shall cause to be preserved and kept the originals of all such records in the office of the State Board of Health in the Capitol building at Springfield."

Section 3 of the same act creates vital statistic registration districts throughout the State.

Section 4 provides that in cities, villages, and incorporated towns in which registration of births, stillbirths, or deaths is conducted under local ordinance, the officer in the city, village, or incorporated town who is a local registrar under such ordinance, shall be the local registrar under the statute for that district. Under this section a registration district is created in Chicago and the president of the Board of Health is the local registrar.

Section 22 of the act provides that each local registrar is charged with a strict and thorough enforcement of the provisions of the act in his district under the supervision and direction of the State Board of Health. It further provides that each local registrar shall report immediately to the State Board of Health any violation of the law coming to his knowledge by observation, or upon the complaint of any person, or otherwise.

It is our opinion that if you have any doubt as to the genuineness of the certificate upon which you inquire, or its contents, it is your duty under the statutes to immediately notify the State Board of Health.

In answer to your query, "Has there been a violation of the Municipal Code?", please be advised that sections 2178 and 2198 of the Revised Chicago Code of 1931 provide as follows:

"2178. *Births—physicians and midwives must report.*) It shall be the duty of every physician or midwife who attends the birth of a child to report the same to the department of health within ten days from the date of such birth. Such reports shall be made in writing on blank forms to be furnished by said department and shall give the name and date of birth of such child and such other information as said department shall require."

"2198. *Penalty.*) Any person who violates, disobeys, omits, neglects or refuses to comply with, or who resists the enforcement of, any of the provisions of this chapter, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense, and a separate and distinct offense shall be deemed to have been committed for each and every day on which any such person shall be guilty of such violation or failure or refusal to comply with any of the provisions of this chapter."

It is to be presumed that a certificate of birth certified to by an attending physician is true. If it should later develop that the statements therein were false the filing of such certificate is fraudulent and is a violation of the City code.

With reference to your query, "Should the Chicago Board of Health recommended or suggest action against Dr. R— by the State Board of Health?", the statute provides for the reporting of all violations but it does not provide for any recommendation by the local registrar.

With reference to your query, "Is there any step which Dr. R— should take at this time to rectify the matter, and what should be the action of the Board of Health relative to the alleged violation?" Dr. R— should

be required to file a new certificate or amend the old certificate so as to speak the truth.

With reference to prosecution for the violation, section 22 of the Illinois statute hereinbefore referred to provides for the prosecution by the State Board of Health when it deems it necessary. Same section provides that the local registrars in cities, incorporated towns, or villages, operating under local ordinances, may report such violation to the city or local prosecuting attorney.

KIND OF TIME FOR RECORDING BIRTH CERTIFICATES

(No. 9610—*President, Board of Health—M.D.S.—September 9, 1937—1½ pp.*)

Whether the time for filing and recording of birth certificates should be daylight saving time or standard time is governed by the rules of the State Board of Health, which apply uniformly throughout the State. The city of Chicago is a vital statistic registration district, and as such operates under the rules and regulations of the State Board of Health which has charge of the registration of all births, stillbirths, and deaths.¹

Citation: ISBS '35, 65a: 17, 19.

D. THE CITY CLERK

CITY CLERK'S SIGNATURE ON LICENSES

(No. 9122—*City Clerk—M.D.S.—April 13, 1936—1½ pp.*)

By ordinance, the signature of the City Clerk must appear on all licenses. Therefore, his signature must appear on any driver's license.

Citation: Code '31: 25. 2895.

¹ The State Department of Public Health has advised that entries on birth certificates in this State should always be made in accordance with standard time. See letter of State Department of Public Health of July 5, 1927, to Superintendent of Hinsdale Sanitarium and *Opinions of the Illinois Attorney General* (1923-24), page 267, on this point.

OPINION OF FOREGOING SYNOPSIS

Your communication dated March 23, 1936, has been received transmitting sample of original driver's license and asking for an opinion as to whether or not the signature of the City Clerk should appear on said license.

Please be advised that section 2895 of the Revised Chicago Code of 1931 provides as follows:

"2895. *Mayor to grant.*) In all cases where licenses are required to be procured, such licenses shall be granted by the mayor and attested by the city clerk * * *."

Also section 225 of the said Code provides that the City Clerk "shall attest all licenses granted under the ordinances of the City and he shall keep a record of the issuance thereof."

It is our opinion that the signature of the City Clerk must appear on all licenses.

USE OF CITY SEAL BY PRECINCT CAPTAIN

(No. 9327—Assistant to the Mayor—C.N.—November 9, 1936—2 pp.)

A precinct captain has no right to use the City seal in connection with his political activity.

Citation: McQuillin, *Municipal Corporations* (2nd ed.), vol. 1, sec. 278.

PHOTOSTATING OF PUBLIC DOCUMENT

(No. 9543—City Clerk—C.N.—June 11, 1937—2½ pp.)

The City Clerk has discretion to determine what facilities he should offer in making a copy of a license application available for certification. Since it is the duty of the City Clerk to keep the license application available to all as a public record, he cannot permit any person to remove it from the files for photostating. The only way in which a photostatic copy could be provided would be to have some one from his office in continuous control of the license application during the photostatic process.

Citations: SH '33, 121½: 149.

ISBS '35, 51: 14; 121a: 82-89.

OPINION OF FOREGOING SYNOPSIS

We have your letter of June 5, 1937, in which you refer to a license issued to a certain fur company for conducting a removal sale in accordance with section 149, chapter 121½, Smith-Hurd's Illinois Revised Statutes, 1933. You state that the company concerned filed the required application, together with an inventory and a sworn statement supporting the same. You also say that the Better Business Bureau questioning certain features of the purported sale has asked to take the application from your office and have a photostatic copy made of the same. You ask if the City Clerk has the right to allow this to be done without a court order.

The act referred to is now embraced in paragraphs 82 to 89 inclusive, chapter 121a, Illinois State Bar Statutes, 1935. It requires that before conducting certain types of sales designated an application must be filed with the City Clerk.

Paragraph 84 reads as follows:

"Par. 84. *Duty of clerk—Record.*) Section 3. Every such clerk shall endorse upon each such application the date of its filing, and shall preserve it as a public record of his office, and shall make a notation of it in a book to be kept for that purpose, properly indexed, showing the name of the applicant, the date of the application, the descriptive name of the proposed sale, the place where such sale is to be conducted, its duration, the date of the license issued thereon, and the value of the stock of goods, wares and merchandise thus to be sold."

From the above it is clear that the application upon being filed with the City Clerk and handled by him in the manner designated becomes a public record. Paragraph 14, chapter 51, Illinois State Bar Statutes, 1935, provides that such records may be proved by a copy thereof certified under the hand of the keeper of the same and that the corporate seal should be affixed thereto.

It is clear that the Better Business Bureau like any other interested member of the community has a right to avail itself of this public record, but the matter of providing a certified copy depends solely upon the custom and usage of your office, as the law requires no more of you than to certify as to any true and correct copy. Since the duty is imposed upon you to keep this public record available to all, it is obvious that you cannot permit any bureau or individual to remove the application from your files for the purpose indicated. The only way in which a photostatic copy could be provided would be by having some one in your department in continuous control of the document during the time of the photostatic process. It is within your discretion to determine what facilities you may offer in making a copy available for certification.

E. THE CITY COMPTROLLER, FIRE DEPARTMENT, DEPARTMENT OF PUBLIC WORKS, AND OTHERS

PAYMENT OF EMPLOYEE'S NOTE FROM SALARY

(No. 9172—City Comptroller—C.H.L.—May 21, 1936—21½ pp.)

The City Comptroller will not be protected by law if he pays a promissory note issued by a City employee from salary due him as a City employee. As the City employee is deceased, the salary check should be turned over to the executor or administrator of his estate.

Citation: *Merwin v. Chicago*, 45 Ill 133 (1867).

OPINION OF FOREGOING SYNOPSIS

We have your communication of May 4, 1936, wherein you request to be advised as to what procedure you should take in regard to a check due (a certain City employee) for 14 days back pay from the year 1931, when same is ready for payment.

We note that * * * a client of Attorney K— holds a promissory note in the amount of \$200.00 signed by (the City employee) and * * * his wife, and that Attorney K— requests you to hold up any moneys due and payable to the (City employee and his wife) to the extent of \$200.00.

It is our opinion that the city of Chicago has no interest in the claim of the client of Attorney K— whatsoever under the facts stated, and you will not be protected under the law if you do what the attorney requests you to do.

In support of this opinion we quote from the leading Illinois case (citing other cases) on the question whether municipal corporations in this State are liable to the process of garnishment, *Merwin v. City of Chicago*, 45 Ill 133, in which the court used the following language:

"That its efficiency for purposes of government would be impaired by holding it liable to garnishment, cannot be doubted. A large and growing city like Chicago, must constantly have hundreds of persons in its employment, and if the city cannot, at short intervals, make a settlement of these multitudinous accounts, but is liable to be drawn into court at the suit of every creditor of its numerous employees, it will not only be engaged in such expensive and vexatious litigation, in which it has no interest; but if unable to safely pay its employees and contractors, it may lose the services of persons that may be of much value. We understand, however, the counsel for the appellant to concede, that money due

municipal officers, agents or contractors, is not liable to garnishment; but it insisted, if the city had been required to answer, the alleged indebtedness, in the present case, would not have fallen in either of these classes. But, in our opinion, the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another. A private corporation must assume the same duties and liabilities as private individuals, since it is created for private purposes. But a municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should be not subjected to duties, liabilities, expenditures, merely to promote private interest or private convenience."

In conclusion we wish to say that when the check in question is ready for payment it should be turned over to the executor or administrator of the estate of the City employee who is deceased.

CONTROL OF SCHOOL FIRE DRILLS BY FIRE DEPARTMENT

(No. 9547 — Fire Commissioner—E.R.D.—June 28, 1937—
1½ pp.)

The Bureau of Fire Prevention has no right to conduct fire drills in the public, parochial, and private schools of the City. The schools and school children of the City are subject to the supervision and control of the Board of Education, churches, or individuals, and no right is given the Fire department or any of its bureaus, by statute or by ordinance, to compel fire drills in the schools. Neither is authority given the Fire department to insist upon participating in any fire drills that may be contemplated by any of the schools.

PERMIT FOR DRIVEWAYS OVER SIDEWALKS ON VIADUCTS

(No. 9328—*Commissioner of Public Works—J.J.S.—November 10, 1936—1½ pp.*)

The Commissioner of Public Works has power under the existing ordinance to issue permits for driveways which do not elevate or depress the regular grade of the sidewalk over sidewalks on viaducts without any further grant of authority by the City Council.

Citation: Code '31: 856 as amended, Coun. J. (1934-35), p. 2551.

FREE INSPECTIONS AND PERMITS FOR CHURCH RECTORY

(No. 9469—*Commissioner of Public Works—R.N.—March 31, 1937—1 p.*)

The Commissioner of Public Works may not issue free permits for the erection of a church rectory building without authority from the City Council as the making of free inspections and issuing free permits to religious institutions is a matter of courtesy and not a matter of right.

CHARGE FOR PUBLICATIONS OF CHICAGO RECREATION COMMISSION

(No. 9307—*Executive Secretary, Chicago Recreation Commission—A.F.G.—October 14, 1936—1½ pp.*)

The Chicago Recreation Commission may make a charge for its publications, provided specific authority to do so is first obtained from the City Council.

Citation: Code '31: 639.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of October 8, 1936, together with several publications issued by your Commission.

You state that these publications were issued with public funds and are reserved for the administrative officers to whom they are issued without charge.

You state also that there is a great demand for these publications from public libraries, various institutions, organizations, and individuals, and ask us to advise you "whether it would be proper and legal for the Commission to make a charge for publication of the Commission to meet the demands from private persons."

Article II of chapter 7 of the Revised Chicago Code of 1931 refers to the Municipal Reference Library. Section 639 of that article is as follows:

"639. *Publications to be turned over to the librarian.*) Heads of departments, boards, commissions, council committees, or other divisions of the city government, shall deliver to the municipal reference librarian at least once in each fiscal year all publications in their custody which are not required for further use, and such publications shall be disposed of by the municipal reference librarian in the manner provided for in this ordinance. *No publications shall be sold by any department, bureau, division, board or commission, unless the sale thereof shall be specifically authorized by the city council.*"

From the foregoing we are of the opinion that it would not be illegal for the Commission to make a charge for its publications provided that specific authority to do so has first been obtained from the City Council.

SALES TAX ON PRINTING OF MUNICIPAL COURT FORMS

(No. 9383—*Superintendent, Bureau of Purchasing—A.F.G.—December 30, 1936—21½ pp.*)

Printed forms which are used in connection with suits filed in the Municipal Court, and are kept in the Clerk's office for the convenience of lawyers, are special printed matter and not subject to the retailers' occupation tax.

The City has a right to any refund from a printer which the State may make to him on account of sales of special matter printed for the City. As the City has not paid the tax directly to the State on these purchases, it has no right to a refund directly from the State.

Citations: *Adair Printing Co. v. Ames*, 364 Ill 342 (1936).
Burgess Co. v. Ames, 359 Ill 427 (1935).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of December 21, 1936 in which you call our attention to a recent decision of our Supreme Court in the case of *Adair Printing Company v. Ames*, 364 Ill 342, in which it was held that printers are not liable for retailers' occupation tax with respect to the production on order of special printed matter such as letterheads, circulars, mail order catalogues, printed briefs for lawyers, or any other printed matter which is without commercial value to any person other than the one for whom the printing is done.

You state also that all of the City's printing is consumed or used by the city of Chicago with the exception of some work done for the Municipal Court Clerk's office. This consists of printing the various forms used in connection with suits filed in the Municipal Court and are kept in the Clerk's office for the convenience of lawyers, or are given freely to members of the legal profession having business with that court.

You ask our opinion in view of the decision cited above, whether this item of printing would be subject to the retailers' occupation tax.

It is our opinion that these forms are properly includible in the special printed matter mentioned in the *Adair* case cited above and are not subject to tax. While they are not used directly by the City or the Municipal Court, they are furnished without cost to those who use the facilities of the court for their greater convenience, and are part of the administration of that court.

In the case of *Burgess Company v. Ames*, 359 Ill 427, which was followed in the *Adair* case, *supra*, the court said:

"* * * It is the contention of the department that the paper, with the reproduction on it, is the subject of sale; but this can hardly be true under the act we are considering, because the paper is destroyed when the exposure is made, and it has no further use or value to anyone other than the person interested in the particular reproduction. We can perceive no logical difference between the paper upon which a photostatic copy of something is made or a blue-print produced, and that paper which a lawyer uses for writing a will or deed, a doctor for writing a prescription, or an abstracter for showing a chain of title. The paper is a mere incident; the skilled service is that which is required."

You quote also from a bulletin of the State Department of Finance regarding the right to refunds of printers who since July 1, 1933, have been engaged in the reproduction of special printed matter and who have paid the retailers' occupation tax thereon, and inquire if in our opinion the city of Chicago has a claim as a refund for purchases made since July 1, 1933. As the City has not paid a tax directly to the State on these pur-

chases it would have no right to a refund from the State. However, if the printers with whom your department has been dealing receive a refund on account of purchases made by the City and the tax was passed on to the City as a separate item, we are of the opinion that the City would have a right to the refund which the State makes to the printer on account of sales of special printed matter which the printer has made to the City.

CHAPTER II

THE PUBLIC HEALTH, SAFETY, AND WELFARE

A. ADVERTISING AND HANDBILLS

PROHIBITION OF DECEPTIVE ADVERTISING

(No. 9210—*Secretary, Committee on Judiciary and State Legislation—M.H.F.—July 1, 1936—3 pp.*)

The City probably does not have power to enact an ordinance prohibiting deceptive advertising as no express or implied authority can be found to support the measure.

The City has no inherent powers, and in order to legislate upon any particular subject it must have a grant of power from the State Legislature. The implied powers which it possesses are only those necessarily incident to powers expressly granted to it.

Citations:

- Statutes: ISBS '35, chap. 24.
 ISBS '35, 38: 224(2).
Ordinance: Code '31: 4258.
Case: Fligelman v. Chicago, 348 Ill 294 (1932).

OPINION OF FOREGOING SYNOPSIS

We have examined the draft form of ordinance prohibiting deceptive advertising submitted with your letter of June 15, 1936, concerning which you state your committee desires our opinion.

The draft is in the form of a proposed amendment to section 4258 of the Revised Chicago Code of 1931. The first paragraph is substantially section 4258 as now existing. The new portions are enlargements upon the first paragraph, contain definitions of the term "deceptive advertising" and provide what specific acts shall be deemed to be violations of the ordinance.

If the City had the power to enact and enforce section 4258 as now existing there would be considerable basis for the belief that it possessed authority to add the new provisions. However, it is not clear to us that it

had such power. Cities in Illinois derive their existence and their powers from the General Assembly. They possess no inherent powers. In order to legislate upon or with reference to a particular subject they must have a grant of power from the legislature so to do. The implied powers which a municipality possesses and may exercise are those necessarily incident to the powers expressly granted. (*Fligelman v. City of Chicago*, 348 Ill 294, 299.) Our study of the Cities and Villages act (chapter 24, Illinois State Bar Statutes, 1935) reveals no express grant of authority to enact an ordinance. Neither are we able to discover any power necessarily implied in or incident to a power expressly delegated which, in our opinion, would support the measure. In the absence of express or implied power to pass the ordinance its validity could not be sustained in the courts if attack were made upon it.

* * * * *

If it is not already informed it should be interesting to the committee to know that deceptive advertising is made a misdemeanor by a recent amendment to the criminal code of Illinois. Section 1 of an act entitled "an Act to prevent untrue, deceptive or fraudulent advertising * * *," approved July 2, 1935, [paragraph 224, (2), Illinois State Bar Statutes, 1935], provides as follows:

"Whoever, with intent to sell, or in any wise dispose of merchandise, securities, service, or anything offered by him, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book notice, hand-bill, poster, sign, bill, circular, pamphlet, letter, or window display, card, tag, price ticket, or radio broadcasting, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, misleading or deceptive, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not exceeding twenty days, or by both said fine and imprisonment."

An official of the Chicago Better Business Bureau tells us that salutary results are being secured through prosecutions instituted under this State statute.

REGULATION OF HOUSE TO HOUSE CANVASSERS

(No. 9366—Alderman, 10th Ward—C.N.—December 11, 1936—3 pp.)

A business concern which sends canvassers from house to house to secure orders for merchandise from samples, and in so

doing makes use of the streets and parkways of the City, cannot be restrained from its activities under the ordinance regulating peddlers.

Citations:

Statute: ISBS '35, 24: 65 (41), 625.

Ordinance: Code '31: 3573.

Cases: Emmons v. City of Louistown, 132 Ill 384 (1890).
Village of Cerro Gordo v. Rawlings, 135 Ill 36 (1890).

DISTRIBUTION OF HANDBILLS

(No. 9270—*M.H.F.*—September 9, 1936—2½ pp.)

The Police department took proper action when it stopped the distribution of handbills which were larger than the allowed four and one-half inches by six inches and which were so distributed as literally to cover the street.

Citations:

Ordinance: Code '31: 4281.

Case: Chicago v. Rhine, 363 Ill 619 (1936).

FREE DISTRIBUTION OF NEWSPAPERS

(No. 9685—*Commissioner of Police*—*B.H.*—November 2, 1937—8½ pp.)

The passing out of folded newspapers from hand to hand without throwing or tossing by the person passing them out, even if they are thrown away by the recipients after they have been passed out or distributed, is not prohibited by the City's handbill ordinance.

The publication *People's Press* is a weekly publication containing news matter, mostly, but not entirely devoted to labor union affairs. There are also advertisements and other typical newspaper features, such as matter relating to motion pictures and to women's fashions, and some general news pictures. Both in form and character it comes within the term *newspaper* as

that term has been defined by the State Supreme Court. As a newspaper it cannot properly be called a dodger or handbill, and is not included within the words "advertising matter."

Citations:

Ordinance: Code '31: 4281

Coun. J. (1933-34), p. 852.

Cases: Kerr v. Hitt, 75 Ill 51 (1874).

People v. McLaughlin, 68 NY Supp 1108 (1901).

Schultz v. Chicago, 341 Ill 208 (1931).

Coughlin v. Sullivan, 126 Atl 177 (N. J., 1924).

People v. Horwitz, 140 NY Supp 437 (1912).

People v. Johnson, 191 NY Supp 750 (1921).

Other reference: Webster's International Dictionary, "dodger."

OPINION OF FOREGOING SYNOPSIS

To the question upon which you requested my opinion by your letter of October 11, 1937, I have given careful attention not only for the purpose of replying to the specific question propounded but also for the purpose of indicating, with a view to future situations the principles by which we have to be guided in the enforcement of the handbill ordinance and similar laws. Your letter was accompanied by a copy of a publication called *People's Press*, and you inquire whether the handbill ordinance "is being violated when this paper is distributed from hand to hand and then permitted to drop on the streets."

The publication called the *People's Press* appears to be issued by the People's Press, Inc., 130 North Wells Street, Chicago. Frank L. Palmer is designated as its publisher. Its subscription price is stated to be one dollar per year. It purports to be a weekly publication issued every Saturday and to be entered as second-class matter at the Chicago post office. It is printed on sheets approximately 23 by 11 inches in size, each containing four pages and folded to produce a page size of approximately 16 by 8 inches. It contains news matter, mostly, but not entirely, devoted to labor union affairs, and also advertisements and other typical newspaper features such as matter relating to motion pictures and to women's fashions and some general news pictures. Both its form and character are such as to require it to be regarded as a newspaper within the meaning given that term by the Supreme Court of Illinois in *Kerr v. Hitt*, 75 Ill 51.

The ordinance in question is section 4281 of the Revised Chicago Code, 1931, as amended July 11, 1933 (Coun. J., p. 852) which is as follows:

"4281. *Distribution of advertising matter.*) It shall be unlawful for any person to distribute advertising matter of any kind on any public street of the City otherwise than from hand to hand without tossing or throwing; and it shall be unlawful for any person to distribute, hand out or scatter on any public street or sidewalk any handbills or dodgers of a size four and one-half inches by six inches or larger, or any other loose

sheets of advertising matter which would litter the street or sidewalk if allowed to drop thereon; provided, that such handbills, dodgers or loose sheets, if enclosed in envelopes or folded or otherwise handed out in such a manner as to avoid the likelihood of falling while being passed out, may be distributed from hand to hand if not tossed or thrown. Any person distributing advertising matter on a public street which is different from that permitted under the provisions of this section, or in a manner contrary to the methods prescribed herein, or in such a manner that the public street becomes littered by its distribution shall, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars for each offense."

The first clause of the ordinance, that "It shall be unlawful for any person to distribute advertising matter of any kind on any public street of the City otherwise than from hand to hand without tossing or throwing," was not violated in this case because the paper in question was distributed "from hand to hand without tossing or throwing."

The second clause of the ordinance, that "it shall be unlawful for any person to distribute, hand out or scatter on any public street or sidewalk any handbills or dodgers of a size four and one-half inches by six inches or larger, or any other loose sheets of advertising matter which would litter the street or sidewalk if allowed to drop thereon," was not violated in this case because the paper in question was not a "handbill" or "dodger" nor was it "loose sheets of advertising." The term "dodger" is synonymous with "handbill" and a handbill has been defined judicially as "a printed circular. (*People v. McLaughlin*, 68 NY Supp 1108.) In *Webster's International Dictionary* it is defined as "A loose printed sheet to be distributed by hand, as for advertising." It follows that any paper which can properly be called a newspaper cannot properly be called a dodger or handbill. The term handbill or dodger would, therefore, not apply to the paper in question. Nor could this paper be regarded as "loose sheets of advertising" since sheets of which it is composed are folded into the form of a newspaper and are not loose.

The proviso in the ordinance, "that such handbills, dodgers or loose sheets, if enclosed in envelopes or folded or otherwise handed out in such a manner as to avoid the likelihood of falling while being passed out, may be distributed from hand to hand if not tossed or thrown," clearly excludes this paper from the things to which the ordinance relates since the paper was "folded" when distributed and it cannot be said that it was not handed out "in such a manner as to avoid the likelihood of falling while being passed out." Under this proviso so long as the distributed printed matter is handed out "in such a manner as to avoid the likelihood of falling while being passed out," it "may be distributed from hand to hand if not tossed or thrown." What happens to it after it is passed out is not covered by the ordinance so long as the manner of passing it out is such "as to avoid the likelihood of falling while being passed out."

The final provision of the ordinance, that "Any person distributing advertising matter on a public street which is different from that permitted under the provisions of this section, or in a manner contrary to the methods

prescribed herein, or in such manner that the public street becomes littered by its distribution, shall, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars for each offense," is not violated because this newspaper is not different from those things which the ordinance permits to be distributed and the manner of its distribution was not contrary to the methods described therein.

It is necessary to observe those limitations which must be placed upon the words "advertising matter" and which exclude a newspaper from their scope. If it were possible to construe "advertising matter" in this connection to include newspapers, to do so would bring the ordinance within the scope of the condemnation of a previous ordinance by the Illinois Supreme Court in *Schultz v. City of Chicago*, 341 Ill 208, as follows:

"* * * The ordinance also prohibits the handing out or distribution 'of any advertising matter of any kind whatsoever,' and it would seem that under this broad restriction the distribution of newspapers would also be prohibited, as they all contain advertising matter. Laws which attempt to regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty. Under our constitution and system of government the object and aim are to leave the individual entirely master of his own conduct, except where the public good requires some direction or restraint."

Such inhibitions in a handbill ordinance have also been condemned in other states. A New York decision on this subject illustrates what may and what may not be inhibited in such an ordinance. In *People v. Johnson*, 191 NY Supp 750, an ordinance was involved which provided that "No person shall throw, cast or distribute any handbill, circular, card, or other advertising matter whatever, in or upon any street or public place," etc. Under it the defendants were convicted for handling our circulars in front of a theater where a moving picture exalting the activities of the Ku Klux Klan was being exhibited. The circulars bore the announcement that they were published by the "National Association for the Advancement of Colored People." The defendants were acting as agents of that organization. The court held that the ordinance was never intended to prevent the lawful distribution of anything other than commercial and business advertising and the circulars in question did not come within that category, and said:

"It would be a dangerous and un-American thing to sustain an interpretation of a city ordinance which would prohibit the free distribution by a body of citizens of a pamphlet setting forth their views against what they believed to be a movement subversive of their rights as citizens. * * * The primary purpose of the ordinance * * * was to prevent the littering of streets with commercial advertising. * * * The ordinance within reasonable limits is a proper one, and should be sustained, but no city ordinance, no matter how worthy its intentment, should be permitted in any way to curtail any of the fundamental rights of the citizen. The circular in question was a protest against what was believed to be a movement which encouraged discrimination against certain classes of citizens because of race, color, or

religious beliefs, and, whether or not there was a sound basis for that belief, they were within their rights in making public their protest against such a movement, and to make known their protest they used possibly the only means available by the distribution of circulars and pamphlets to the public."

The city of Chicago has no express power to make and enforce provisions such as are found in the handbill ordinance. Its power in that regard must be implied in, or necessarily incident to, its power to regulate the use of streets and sidewalks or its general police powers. This was held in *Schultz v. City of Chicago*, 341 Ill 208, above referred to, where the court said:

"From the foregoing provisions it will be seen that the legislature has not expressly granted power to cities enabling them to prohibit the distribution and handing out of 'any circular, dodger, handbills, pamphlet, card, picture, or any advertising matter of any kind whatsoever,' on streets and sidewalks. * * * Therefore if the city has authority to pass such an ordinance it must be either under its power to regulate streets (clause 9) or under its general police powers delegated by clause 66, and it must be a reasonable regulation, tending in some degree toward the prevention of offenses or preservation of public health, morals, safety or welfare. * * *

"If, as contended by the city, the ordinance in question was authorized under the general police powers of the city, it would then remain to be seen whether the municipal authorities have in this case reasonably exercised such power. The only essential and universal limitation upon the exercise of the police power is that the regulation shall be reasonably necessary and reasonably exercised."

If the passing out of handbills or dodgers is accompanied by other unlawful acts such as creating a riot or other breach of the peace or obstructing traffic, etc., other laws will govern the matter and it is not necessary to consider such situations here. The ordinance now in question relates only to the *passing out* of dodgers, handbills, etc. Concerning this matter it appears from the authorities that the regulation by the City "reasonably necessary and reasonably exercised" relates merely to the prevention of the littering of public streets and sidewalks. In fact the terms of the ordinance so limit its purpose. The necessity of so limiting its power to regulate, and the validity of the power when so limited, is shown clearly by several cases, of which I desire to quote from but two.

In *Coughlin v. Sullivan*, 126 Atl 177, the Supreme Court of New Jersey said:

"The enactment of reasonable ordinance regulating or prohibiting the distribution of circulars, pamphlets, and other advertising matter, in such manner as will ordinarily result in the littering of streets or other public places, constitutes a valid exercise of the police power under the 'general welfare clause,' and does not contravene constitutional provisions.

"It is a matter of common knowledge of which the court will take judicial notice, that certain circulars, pamphlets, etc. especially such as

advertise commercial or business enterprises, when indiscriminately distributed to pedestrians, having no desire or use for them, are cast away so as to litter the streets. The natural and ordinary result of the distribution of such circulars being to litter the streets, and ordinance prohibiting their distribution is adapted to, and reasonably necessary to prevent, such evil."

In *People v. Horwitz*, 140 NY Supp 437, the court said:

"* * * I would put the constitutionality of this ordinance on the ground that a municipality, through its legislative body, has the right to prohibit the use of the streets by persons for any purpose detrimental to the common good, or that may conflict or interfere with the rights of others in the enjoyment of the highways, which should be unincumbered and clean, so as to promote the safety, health, and comfort of the public."

Since a reasonable exercise of the powers of the City includes the prevention of the littering of streets and sidewalks, the distribution even of newspapers not from hand to hand, but by tossing or throwing them so as to litter streets and sidewalks with them, may be forbidden and punished. The ordinance in question forbids such a distribution even of newspapers. But it does not forbid the passing out of newspapers from hand to hand without tossing or throwing by the person passing them out, even if they are thrown away by the recipients after they have been passed out or distributed.

B. NUISANCES AND BUILDINGS

POLICE PROTECTION FOR ABATEMENT OF UNLAWFUL BUILDING

(No. 9214—*Commissioner of Police*—*W.V.D.*—*May 4, 1937*—*6 pp.*)

The Commissioner of Police is required by ordinance to detail a sufficient number of men, at the request of the Commissioner of Buildings, to keep the peace while the Fire department under orders from the Commissioner of Buildings tears down a frame building erected within the City's fire limits without a permit, provided the Commissioner of Buildings has given notice to the owner of the building to cause the building to conform to the City's ordinances, and the owner has failed to comply with the notice.

Citations:

- Statute: ISBS '35, 24: 65(62), 65(75).
 Ordinances: Code '31: 399-450, 1629.
 Cases: Patterson v. Johnson, 214 Ill 481 (1905).
 King v. Davenport, 98 Ill 305 (1881).
 Ward v. City of Murphysboro, 77 Ill App 549 (1898).

OPINION OF FOREGOING SYNOPSIS

In your request of April 23, 1937 for an opinion as to the duty of the Police department to comply with the request of the Commissioner of Buildings to detail sufficient men to keep the peace while the Fire department, acting under orders from the Commissioner of Buildings, tears down a frame building, you do not state whether this building is located within the fire limits. However, the records of the Department of Buildings show that on May 8, 1936 an inspector of that department discovered this frame building being erected without a permit, and these premises are within the fire limits.

Your inquiry presents for our consideration the authority of the Commissioner of Buildings to tear down a frame building constructed within the fire limits.

Section 1629 of article 5, chapter 26 of the Revised Chicago Code of 1931 provides as follows:

"1629. *Frame buildings prohibited—exceptions.*) (a) Hereafter no frame building shall be erected, nor any frame addition made to any existing frame building, within the fire limits of the city, except where express provision is made in this ordinance therefor. * * *

The above ordinance was enacted pursuant to authority vested in the City Council of the city of Chicago by virtue of paragraph 65 (62) of chapter 24, Illinois State Bar Statutes of 1935, entitled "Cities, Villages and Towns," which paragraph reads as follows:

"65(62) *Fire limits—Defective Buildings.*) The city council, and the president and trustees in villages, for the purpose of guarding against the calamities of fire, shall have the power to prescribe the limits within which wooden buildings shall not be erected or placed, or repaired, without permission, and to direct that all and any buildings within the fire limits, when the same shall have been damaged by fire, decay or otherwise to the extent of fifty per cent of the value, shall be torn down or removed and to prescribe the manner of ascertaining such damage."

The erection of this frame building within the fire limits is a violation of a valid ordinance of the city of Chicago and section 412 of the Code provides, among other things, whenever any building or structure or part thereof has been constructed or built in violation of any of the provisions of article 7, chapter 4 of the Revised Chicago Code of 1931 or of any of the provisions of the building ordinances of the City, the Commissioner of Buildings shall notify the owner or agent etc., of the fact that said

building or structure has been constructed or erected contrary to the provisions of the building ordinances of the City, shall specify briefly in such notice in what manner the provisions of such ordinances or any of them have been violated, and shall require the person so notified to forthwith make such building conform to and comply with the provisions of such ordinances specifying in such notice the time within which said work shall be done.

Section 413 of the Code authorizes the Commissioner of Buildings, in the event said notice is not complied with, to proceed forthwith to tear down, or cause to be torn down, such building or structure or part thereof as may have been erected or constructed in violation of any of the provisions of such ordinances.

The question arises whether there is authority vested in the City Council by the legislature for the passage of section 413 of the Revised Chicago Code of 1931. Paragraph 65 (75) of chapter 24 of the Illinois State Bar Statutes of 1935, entitled "Cities, Villages and Towns", confers upon the City Council the power to declare what shall be a nuisance and to abate the same and to impose a fine upon parties who may create, continue or suffer nuisances to exist.

The above section is ample authority for the passage of the ordinance in question. The inquiry then must be whether an enactment of such a law is within the competency of legislative power. All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature under the police power vested in them by the Constitution may think necessary for the prevention of injuries to the rights of others and the security of public health and safety. In the exercise of this power the legislature may only provide that certain kinds of property, either in itself a nuisance, or because of the manner in which it is used, or because of the circumstances surrounding the same, may be seized and confiscated upon legal process after notice and hearing; but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities when the exigencies of the case require.

In the present instance it is not necessary that it be first adjudicated that the construction of the building is a nuisance. The Supreme Court in *Patterson v. Johnson*, 214 Ill 481, at page 490, quoting the Supreme Court of Indiana in *Baumgartner v. Hasty*, 100 Ind 575, said:

"A wooden building is not in itself a nuisance but when erected in a place prohibited by law and where it endangers the safety of adjoining property it may become a nuisance. If the locality and character of such a building do endanger the safety of surrounding buildings then it may be treated as a nuisance, and a governmental body having authority to legislate upon such subjects may prohibit its erection in places where it would endanger the safety of surrounding property. There are many things that are not nuisances *per se*, but which become such when placed in locations forbidden by law and where they essentially interfere with the enjoyment of life or property."

The court in the same case further said:

"The author of Wood's Law of Nuisance, in section 109, in discussing the right of cities and villages to regulate the construction of buildings within their corporate limits, says: 'While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous by reason of the materials used in or the manner of its construction, or that is inherently weak or in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it.'"

The necessity for summary action on the part of municipal authorities is aptly expressed in the language of the Supreme Court:

"There can be no doubt, it seems to us, that the ordinance in question was a police regulation, proper, and made in good faith, 'for the purpose of guarding against the calamities of fire', in a populous neighborhood; and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power, than that of the prohibition of the erection of buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry and hearing could be had in the matter, the whole evil sought to be guarded against might be produced.

"The imposition of a penalty would but punish the offender; it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy." (*King v. Davenport*, 98 Ill 305).

The ordinance having provided for notice to the owner or agent, the notice should be given in accordance with the terms of the ordinance before the Commissioner of Buildings should proceed in tearing down the structure, or the Commissioner of Buildings or those assisting him in the destruction of the building may be liable to the owner for such damage as he may sustain. (*Ward v. City of Murphysboro*, 77 Ill App 549).

If the owner or agent of the building fails to comply with the provisions of the ordinance after having received due notice, the Commissioner of Police is required by section 422 of the Code, when called upon by the Commissioner of Buildings, to act according to the instructions of and to perform such duties as may be required by said Commissioner of Buildings in order to enforce or put into effect the provisions of the aforementioned ordinance.

REMOVAL OF DEBRIS FROM WRECKED BUILDING

(No. 9355—*Deputy Acting for the Mayor, Department of Buildings—A.F.G.—December 7, 1936—1½ pp.*)

The Department of Buildings has the power to remove debris and building materials that have accumulated from dangerous buildings that it is wrecking.

Citation: Code '31: 411.

RESTRICTIONS ON THE DEMOLITION OF DILAPIDATED BUILDINGS

(No. 9436—*Alderman, Fiftieth Ward—M.A.G.—February 20, 1937—2 pp.*)

A building which is structurally safe, and which may be boarded up so that there will be no possible chance of anyone remaining in it, may not be declared by the City to be a nuisance.

The City has no authority summarily to demolish dilapidated or unsightly buildings without the consent of the owner unless they are imminently dangerous to the public health or safety, and then only in case the existing situation cannot be remedied by less drastic means than the complete destruction of the building.

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of February 10, 1937, with reference to the two uncompleted buildings at 1916-1918 and 1957-2001 Lunt avenue, we are herewith submitting to you our opinion as requested by yourself, after an investigation by this department and the Building department.

1957-2001 Lunt avenue is a three-story, ordinary construction, unfinished apartment building with door and window openings unfinished. The building stands open. The brick walls are in a safe condition. After the roof joists were placed, the construction was discontinued. The Building department is now taking steps to remove the gable on the east wall and board up all openings.

1916-1918 Lunt avenue is a three-story, unfinished apartment building of ordinary construction. All doors and windows are open. The building is completed to the roof joists only. The brick walls are in a safe condition. The Building department is now taking steps to remove the floor joists and board up all openings.

With reference to your statement as to demolishing these buildings, we must kindly inform you that the City has no authority to summarily demolish dilapidated or unsightly buildings without the consent of the owner, unless they are imminently dangerous to the public health or safety, and even then only in case the existing situation cannot be obviated by less drastic means than the complete destruction of the building.

The Building department has informed us that these two buildings are structurally safe and that the boarding up of the openings will remove any possible chance for anyone to remain in these premises. They have also told this department that they have never issued any order stopping work on these buildings.

In view of these facts as heretofore outlined and in accordance with the law of this State "which holds that mere unsightliness of a building which is the usual and natural result of dilapidation does make it a nuisance," the City would have no authority to declare these buildings nuisances because in that event the City would be liable for damages.

VENTILATING EXHAUST AS NUISANCE

(No. 9120—Chairman, Commission for Revising the Building Code—A.F.G.—April 9, 1936—2½ pp.)

If a ventilating exhaust is placed at such a point as actually to create a nuisance, the owner of the premises is liable both in a civil action and under the State criminal code, and the exclusion from the proposed building code of the requirement that such a ventilating exhaust must be placed where it will not create a nuisance would not in any way affect the liability of the owner.

Citations:

Statute: ISBS '35, 38: 453(8).

Cases: Rosehill Cemetery Co. v. Chicago, 325 Ill 11 (1927).

Seacord v. People, 121 Ill 633 (1887).

Other reference: 46 CJ 655.

OPINION OF FOREGOING SYNOPSIS

* * * My attention (has been called) to some objections which had been raised to the language used in section 4702.06, chapter 47, Mechanical Ventilation. The part of the section referred to reads as follows:

"4702.06. *Point of Exhaust Discharge.* The air removed by every mechanical ventilating exhaust system shall be discharged out of doors at a point where it will not cause a nuisance, and from which it cannot again be readily drawn in by a ventilating system * * *."

* * * The Building Managers Association and others object to the phrase "where it will not cause a nuisance."

A nuisance has been defined as something that is offensive physically to the senses and by such offensiveness makes life uncomfortable. (*Rose-hill Cemetery Co. v. City of Chicago*, 325 Ill 11, 30.) In discussing one class of nuisance, i. e. atmospheric pollution, *Corpus Juris* lays down this rule:

"As a general rule the contamination or pollution of the atmosphere with offensive matter to such an extent as substantially to interfere with the comfort or enjoyment of others, or impair the use of their property, may constitute a nuisance." (46 CJ 685).

Our Supreme Court in discussing this same matter of air pollution said this:

"* * * To live in the comfortable and free enjoyment of the air, free from unnecessary pollution, is the right of all, and any act which takes this away from an individual, is actionable as a private injury; that which deprives the community of the right, is indictable as a public wrong. (*Seacord v. People*, 121 Ill 633, 637.)

At common law pollution of the air and the dissemination of offensive smells and odors were nuisances which the law could abate and punish and by the criminal code of this State it is declared to be a nuisance punishable by fine and imprisonment:

"To erect, continue or use any building or other place for the exercise of any trade, employment or manufacture, which, by occasioning noxious exhalations, offensive smells or otherwise, is offensive or dangerous to the health of individuals, or of the public." (Subsection 8, section 453, chapter 38, page 1216, Illinois State Bar Statutes, 1935).

From the foregoing we are of the opinion that it does not matter whether the phrase complained of is included or excluded from section 4702.06 of the new building code but believe it should be included for the purpose of direction. If the exhaust is placed at such a point as actually to create a nuisance the owner of the premises is liable both in a civil action and under the criminal code, and the exclusion of the words "where it will not cause a nuisance" would not in any way affect his liability.

REGULATION OF SOAP FACTORIES

(No. 9592—M.H.F.—August 13, 1937—1½ pp.)

The City possesses express power to direct the location and to regulate the management and construction of soap factories within its limits and within one mile outside of its limits.

Citations:

Statute: IRS '37, 24: 65.80.
Ordinance: Code '31: 3861-3866.

USE OF BARBED WIRE ON FENCE

(No. 9503—C.N.—April 26, 1937—1 p.)

Barbed wire may be used on a fence within the City provided the fence is entirely within the limits of private property and does not abut on a street or alley.

Citation: Code '31: 4236.

C. WEIGHTS AND MEASURES

NET CONTENT LABEL ON PACKAGED MERCHANDISE

(No. 9068—Inspector of Weights and Measures—M.H.F.—February 24, 1936—4½ pp.)

The Inspector of Weights and Measures of the City has by law generally the same powers and duties as the Director of Trade and Commerce. The State Weights and Measures act which requires the net contents to be shown on the outside of packaged merchandise cannot be enforced by the City Inspector of Weights and Measures until the State Director of Agriculture, the successor of the Director of Trade and Commerce, has promulgated rules for reasonable variations and exemptions from this statutory provision.

Citations:

Statutes: ISBS '35, 24a: 40; 147: 21.

Case: Ex parte Humphrey, 244 SW 822 (Texas, 1922).

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date states that the deputy inspectors of your department find a growing tendency in retail stores to omit the net contents label from packaged merchandise, and as a result complaints are received from purchasers who claim they cannot intelligently compare quantities and from business competitors on the score of unfair competition. Our opinion is requested as to whether or not the State Weights

and Measures statute, which requires net contents to appear on the outside of packaged merchandise, is enforceable by your department. You tell us that you have requested an opinion upon this question from the Attorney General of Illinois and that official has declined to advise you, informing you instead that the duties of his office preclude him from furnishing legal advice to City officials.

It seems not unlikely that had you addressed your communication to the Illinois Department of Agriculture the director of that department would have given you the State's views upon the question and, if necessary, would have called upon the Attorney General for a legal opinion to form the basis of the views expressed to you.

Section 21 of the State act in relation to weights and measures (chapter 147, Illinois State Bar Statutes, 1935) provides as follows:

"It shall be unlawful to keep for the purpose of sale, offer or expose for sale, or sell, any commodity in package form unless the net quantity of the contents be plainly and conspicuously marked on the outside of the package, in terms of weight, measure, or numerical count: *Provided, however,* that reasonable variations or tolerances shall be permitted, and that these reasonable variations or tolerances and exemptions shall be established by rules and regulations made and promulgated by the Director of Trade and Commerce: *And, provided, further,* that this section shall not be construed to apply to those commodities in package form, the manner of sale of which is specifically regulated by the provisions of other sections of this Act.

"The words 'in package form' as used in this section shall be construed to include a commodity in a package, carton, case, can, box, barrel, bottle, phial or other receptacle, or in coverings or wrappings of any kind, put up by the manufacturer, or, when put up prior to the order of the commodity, by the vendor, which may be labeled, branded, or stenciled, or otherwise marked, or which may be suitable for labelling, branding, or stenciling, or marking otherwise, making one complete package of the commodity. The words 'in package form' shall be construed to include both the wholesale and the retail package. 'Package' as used in this section, does not include any container in which are packed or contained packages of a smaller size of commodity, but the provisions of this section apply only to the container directly enclosing the commodity."

The act provides for the appointment of a city inspector of weights and measures in each city having a population of 25,000 or more inhabitants and gives him generally the same powers and imposes upon him the same duties within his city as are granted to and imposed upon the Director of Trade and Commerce.

By section 40 of the civil administrative code (chapter 24a, Illinois State Bar Statutes, 1935) the State Department of Agriculture was vested with power to execute and administer all laws and regulations relating to weights and measures.

You inform us that neither the Director of the State Department of Trade and Commerce nor the Director of the State Department of Agriculture has made and promulgated any rule or regulation establishing reasonable variations or tolerances and exemptions, as contemplated by section 21 of the Weights and Measures act. Your letter states that your department was informed of this situation in March, 1934, nearly two years ago. Would it not be well to bring your information to date by addressing a communication to the Director of the Department of Agriculture asking him whether rules and regulations have been promulgated and, if so, to supply you with copies and, in case they have not been promulgated, to inform you as to his department's attitude thereon?

The prohibition contained in section 21 against the keeping, offering or exposing for sale or selling commodities in package form is in our opinion conditioned upon and restricted by the provision "that reasonable variations or tolerances shall be permitted, and that these reasonable variations or tolerances and exemptions shall be established by rules and regulations made and promulgated by the Director of Trade and Commerce," now the Director of the Department of Agriculture. Until the variations, tolerances and exemptions shall have been established there can be no violation of the act subject to prosecution. Were you to charge a person with offering for sale or selling a package not marked to show the net quantity he would likely defend upon the ground that, had the exemptions been established, the particular package or packages handled by him might have been included within such exemptions.

In 1919 the legislature of the state of Texas passed an act providing in part as follows:

"No person shall sell, or offer for sale, food, feed, or other commodity in package form unless the quantity of the contents be plainly and conspicuously marked on the outside of the package or container, giving the weight, measure, or numerical count of the contents thereof. Provided, however, that reasonable variations may be permitted and tolerances and exemptions allowed under such rules and regulations as may be made from time to time by the Commissioner of Markets and Warehouses."

In *Ex parte Humphrey*, 244 SW 822, the Court of Criminal Appeals of Texas held that the provision for reasonable tolerances and exemptions contained in the act was mandatory.

It will be noted that the Illinois law is more clearly mandatory than the Texas act, for it provides that "reasonable variations or tolerances *shall* be permitted," and "these reasonable variations or tolerances and exemptions *shall* be established by rules and regulations," whereas the Texas law stated that "reasonable variations *may* be permitted and tolerances and exemptions allowed under such rules and regulations as *may* be made * * *."

COMPULSORY WEIGHING OF PULVERIZED COAL SOLD ON A THERMAL BASIS ²

(No. 9353—Inspector of Weights and Measures—M.H.F.—December 7, 1936—3 pp.)

The section of the Revised Chicago Code of 1931 which requires commodities sold in load lots by weight and delivered by vehicle to be weighed by a public weighmaster does not apply where a company enters into a contract with each customer to deliver pulverized coal on a thermal rather than a weight basis.

If the company, however, sells its coal by weight and guarantees a given number of therms or heat units per one hundred pounds or other quantity measured in pounds or tons, then the compulsory weighing section would apply and require the company to have the coal weighed on the scales of a Chicago public weighmaster and to deliver to the customer the prescribed certificate of weight.

Citation: Code '31: 2947, 3342.

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date states that a newly incorporated company has started selling coal in Chicago in powdered form. You inform us that its method of handling the coal is as follows: the coal is pulverized and dried and forced through a suction hose into a compartment in a tank delivery truck similar to a gasoline or fuel oil truck. The truck contains four compartments, two of which are intended for coal and the other two may be used to haul away ashes from a heating plant. When delivery is made to the customer the pulverized coal is forced under air pressure through a hose to a steel tank in the customer's basement, from which it is blown into the fire box as needed. At the time of the delivery of this coal another suction hose draws the ashes from the heating plant into one of the compartments of the tank truck. The coal is weighed before loading into the tanks by an automatic hopper scale which weighs it in lots of 100 pounds. Deliveries are made by auto truck and average about two tons each. The company does not have facilities for weighing a truck and would have difficulty in arriving at the correct tare weight of the vehicle because the truck would contain an indefinite amount of ashes while making deliveries and because several other obstacles would interfere with obtaining the accurate tare weight. The company contracts with the customer to install complete heating equipment and to sell the powdered coal on a therm basis and proposes to comply with the last

² The Supreme Court of Illinois ruled in *Chicago v. Hauge*, 363 Ill 215 (1936) that the City has power to regulate the methods of weighing coal.

paragraph of section 3342 of the municipal code by entering into a contract with the customer to sell its coal on a therm basis. You ask our opinion as to whether section 2947 of the municipal code applies to such deliveries of coal. Our opinion is that section 2947 does not apply to such deliveries of coal.

Section 2947 relates to commodities sold in load lots by weight, delivered by wagon, truck or other vehicle, and prescribes that every such load shall be weighed by a public weighmaster whose certificates of weight shall be delivered to the purchaser before any of the commodity is removed from the vehicle. The last paragraph of section 3342 prescribes that every person selling or offering coal for sale in the City shall sell the same by advoirdupois weight except where otherwise provided by contract.

If the company enters into a contract with each customer to sell its pulverized coal on a thermal rather than a weight basis, then the customer would not be interested in the weight of the coal and could not be defrauded by false weights. The purpose of section 2947 is to secure to the public honest weights of bulky commodities sold by weight and delivered in load lots by vehicles. If, however, it should be found that the company sells its coal by weight and guarantees the coal to possess a given number of therms or heat units per 100 pounds or other quantity measured in pounds or tons, then section 2947 would apply and require the company to have the coal weighed on scales of a Chicago public weighmaster and to deliver to the customer, at the time of delivery and before unloading, the prescribed certificate of weight.

It is suggested that you call upon the company to submit to you for your examination copies of the contracts which it enters into with its customers and such other evidence as may be necessary to determine this controlling question. Our understanding is that the sale and use of powdered coal is not new and we have been led to believe that it has been sold on a weight basis, the seller merely guaranteeing that it possessed certain thermal units per unit of weight.

POWER TO TEST SCALES IN NEIGHBORING MUNICIPALITIES

(No. 9587—Inspector, Department of Weights and Measures—
W.V.S.—August 9, 1937—2½ pp.)

The City has no power to enter into contracts with neighboring municipalities to test the accuracy of large auto truck scales located in those municipalities. Insuring the accuracy of scales in other municipalities is not a corporate purpose of the city of Chicago.

Citations:

Statutes: ISBS '35, 147: 7, 12.

Cases: City of Kankakee v. Illinois Eastern Hospital, 68 Ill App 112 (1896).
Normal School v. Charleston, 271 Ill 602 (1916).

OPINION OF FOREGOING SYNOPSIS

In your letter of June 2, 1937, you requested our opinion as to whether the city of Chicago may lawfully contract with neighboring villages to test the accuracy of large auto truck scales located in these villages. You pointed out that the cost of the equipment necessary to test these scales is prohibitive for the municipalities in question, particularly in view of the fact that a relatively small fee is customarily charged for the scale testing service, and that numerous small villages bordering on the city limits of the city of Chicago have requested that the City enter into contracts with them providing that the City test the accuracy of these scales for a fee to be fixed by contract.

From your letter it also appears that it is contemplated that the actual tests of the scales in the neighboring municipalities will be conducted by employees of the Department of Weights and Measures of the City, under the supervision of the Weights and Measures Inspectors of the respective municipalities.

In the question which you present, the right of the City to contract for the most advantageous use of its property or equipment, which for the time being is not required for the performance of its duties, is not involved. No emergency exists, nor does it appear that any benefit will inure to the city of Chicago from the performance of these services. The question for determination, therefore, is this: In the absence of emergency, and apart from considerations covering the right of the City to make the most effective use of its property, may the City contract for the use of its equipment and employees in performing services of a private nature?

The fact that the services contemplated are to be performed for another municipality instead of for private persons is immaterial. Insuring the accuracy of scales in other municipalities is not a corporate purpose of the city of Chicago. In *City of Kankakee v. Trustees, Illinois Eastern Hospital*, 66 Ill App 112, (1896) the court, in discussing the right of the city of Kankakee to contract for the construction of a sewer for the exclusive use of a State institution located outside the city limits, said at page 113:

"The law is well settled in this State that a municipal corporation cannot incur obligations except for corporate purposes. It must be conceded that the building of a sewer for the exclusive use of a State institution, located outside of the city limits, is not a corporate purpose." [See also, *Normal School v. Charleston*, 271 Ill 602 (1916.)]

The intention of the General Assembly concerning the testing of scales in small municipalities is clearly expressed. By Sections 7 and 12 of "An Act in relation to weights and measures" (Illinois State Bar Statutes, 1935, ch. 147, pars. 7 and 12), it is made the duty of the State Director of Trade and Commerce (now the Department of Agriculture) to test the accuracy of scales in cities of less than twenty-five thousand inhabitants. The imposition of this duty upon officials of the State is manifestly

inconsistent with the existence of an implied power in the City to perform the services in question.

In our opinion the performance of the contemplated services, and the execution of the proposed contract are not within the powers delegated to the city of Chicago.

D. FIRE PREVENTION

CITY'S JURISDICTION OVER ELECTRICAL INSTALLATIONS IN THE CHICAGO PARK DISTRICT

(No. 9715—Acting Commissioner of Streets and Electricity—
A.F.G.—December 2, 1937—51½ pp.)

The Chicago Park District has exclusive jurisdiction over the installation of lights and other electrical equipment in the parks for park purposes, but the City may enforce its ordinances with regard to the installation of electrical equipment in buildings erected in the parks. The Chicago Park District has no police power over the construction of buildings, the prevention of fires, and the making safe of dangerous constructions. The City, however, has the police power to prescribe fire regulations and to regulate buildings within its limits in respect to fire protection, and may exercise this power within territory controlled by the Chicago Park District.

Citations:

Statutes: Chicago Park District act, sec. 1, 1a, 7.
ISBS '35, 24: 65(61), 65(62), 65(63).

Cases: West Chicago Park Commissioners v. Chicago, 152 Ill 392 (1894).
County of Cook v. Chicago, 311 Ill 234 (1924).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of March 15, 1937. You refer to the Chicago Park District and state that a question has arisen as to whether or not the Commissioner of Streets and Electricity has authority, by reason of the Chicago electrical code, to regulate the installation and alteration of electrical apparatus on property which is under the jurisdiction of the Chicago Park commissioners. You ask our opinion whether your department may compel the Park board to obtain permits and comply with the provisions of the Chicago electrical code in the installation of electrical apparatus on Park property including illuminated

signs or other electrical apparatus on, over, or under streets and boulevards and supervised by the Park authorities.

The Chicago Park District is a municipal corporation and the statute with reference to its authority and powers reads so far as pertinent to the question presented as follows:

"* * * the Chicago Park District shall constitute a body politic and corporate * * *.

"The Chicago Park District shall be vested with all powers heretofore vested in park districts or corporate authorities whose authority is abrogated by this act or by the operation thereof. * * *

"The Chicago Park District shall have power to acquire, lay out, establish, construct, and maintain parks, driveways, and boulevards in such districts, and to control, manage, and govern such parks, driveways, and boulevards, and the use thereof. * * * The commissioners of such district shall constitute the corporate authorities thereof, and shall have *full* power to manage and control all the officers and property of the district, and all parks, driveways, boulevards, and parkways maintained by such district or committed to its care and custody.

"The commissioners of the Chicago Park District may from time to time establish by ordinance all needful rules and regulations for the government and protection of parks, boulevards, and driveways and other property under its jurisdiction; may exclude all objectionable travel and traffic and may make and enforce reasonable traffic and other regulations; and provide penalties not exceeding two hundred dollars for any offense for the violation of such rules and regulations."

It will be noted that the statute vests the Chicago Park District with all the powers vested in park districts or corporate authorities whose authority was abrogated by the Chicago Park District act.

The powers vested in the several park authorities, whose authority was abrogated by the Chicago Park District act, were contained in various acts of the General Assembly. The powers granted by the different acts though were substantially similar, and in so far as relates to the question now under discussion the former park boards had full and exclusive power to govern, manage and direct the parks under their control; to lay out and regulate the same; to pass ordinances for the regulation and government thereof; to appoint such engineers, surveyors, clerks and other officers, including a police force, as might be necessary; to define and prescribe their respective duties and authority; to fix the amount of their compensation; and generally in regard to said parks, they possessed all the power and authority by law conferred upon or possessed by the City Council of the city of Chicago in respect to the public squares and places in the City.

One of the park districts superseded by the Chicago Park District was the West Chicago Park Commissioners. Before park consolidation, a case was brought to settle the question of the power of the city of Chicago to assess the lands embraced in the parks and boulevards under the

control of the park board for the improvement of streets adjacent thereto or abutting thereon. After enumerating the powers of the park commissioners as set out above and other statutory powers, the court, after discussing fully the respective powers of the City and the parks, said:

"In view of these various statutory provisions, it is perfectly plain that the West Chicago Park Commissioners are a municipal corporation, created for the purpose of laying out, establishing, improving and maintaining, certain parks, boulevards and ways within the territorial limits of the city of Chicago, and that it is given full and exclusive power and authority, not only to lay out and improve, but also to govern, regulate, manage, control and direct the same, and that its power and authority in all these respects are plenary, and exclusive of that of the city of Chicago." (*West Chicago Park Commissioners v. City of Chicago*, 152 Ill 392, 402.)

Inasmuch as the jurisdiction of park commissioners within the territory that they control, for the purposes for which they were created, are exclusive of the powers of the municipality in which such parks are located, and inasmuch as such park commissioners necessarily have certain police powers, the question has often arisen and arises here whether the police powers of the City which do not conflict with powers of the park boards in the management and control of their territory for park purposes extend over such territory. We think they do, but it is our opinion that the question of determining the character of electric lights used to illuminate parks, boulevards and driveways; the height and design of standards; the kind, type and location of electric traffic signals and other electrical equipment of similar nature installed in parks and boulevards is wholly within the power of the park board to regulate and the ordinances of the City relative thereto are not controlling.

However, in relation to buildings erected in parks within the city of Chicago, we think a different situation prevails. Park boards are given no police power concerning the construction of buildings, the prevention of fires, the making safe of dangerous constructions. The legislature by statute in this State has conferred on municipal corporations, such as cities, villages and incorporated towns, the police power to prescribe fire regulations and to regulate buildings within their limits in respect to fire protection (ISBS '35, chap. 24, art. V, para. 61, 62, 63), and we believe that this power may be exercised over territory controlled by another municipal corporation.

In *County of Cook v. City of Chicago*, 311 Ill 234, an injunction was sought by the County to restrain the City from enforcing its ordinance against the County in erecting a county jail. In passing on this exercise of the police power, the court said at page 247:

"We are of the opinion that the police power delegated to the city must be construed as between the county and the city, as a delegation of power to the latter which the former is expected to observe.
* * * We are of the opinion that in enacting paragraph 63 of article V of the Cities and Villages act, and in using the language, 'and to

cause all such buildings and enclosures as may be in a dangerous state to be put in a safe condition,' the legislature intended to confer upon the city council such power over all of the buildings erected within the city as the words there indicate, including those of the county or other municipality located therein."

We conclude, therefore, that in the installation of lights and other electrical equipment in the parks for park purposes, the jurisdiction of the Park District is exclusive, but in the installation of electrical equipment in buildings erected in the parks the ordinances of the City are enforceable.

PERMIT FOR ALCOHOL STORAGE TANKS

(No. 9106—Division Marshal in Charge of Fire Prevention—
J.J.S.—March 25, 1936—3 pp.)

The Division Marshal in Charge of Fire Prevention may grant or refuse, according to whether the law has been complied with, a permit to a private party to install alcohol storage tanks above the ground on property leased from the Sanitary District. Frontage consents must be obtained for the installation of the tanks unless they come within certain exceptions provided in the Revised Chicago Code of 1931.

Citation: Code '31: 2667, 2670.

OPINION OF FOREGOING SYNOPSIS

In your letter relative to the stated wish of the Sanitary District to lease to a private party a piece of ground, in the vicinity of S. California avenue for the storage of alcohol in above ground tanks you desire to be advised as to the jurisdiction of your Bureau and the necessity of frontage consents.

Section 2667 of the Revised Chicago Code of 1931 defines flammable liquids and includes alcohol within the definition. Section 2670 of the same Code as amended July 11, 1934, makes it unlawful for any one to install a tank for the storage of liquids mentioned in section 2667 without first obtaining a permit to do so from the Division Marshal in Charge of Fire Prevention. Under the provisions of said section 2670 your bureau, through the Division Marshal, has the right to grant or refuse a permit for the installation of a storage tank, depending on whether the law is or is not complied with.

Paragraph (d) of section 2670 provides for frontage consents of the owners representing the majority of the total frontage in feet of any lot or lots or plot or plots of ground extending 150 feet on both sides of the lot or plot on which the tank is to be installed. This frontage consent is

necessary unless the use of the tank comes within the exceptions found in paragraphs (d) and (e) of this section. Paragraph (d) reads as follows:

"(d) It shall be unlawful to install any tank or tanks for the storage or sale of any of the liquids mentioned in section 2667 in any lot or plot of ground without first obtaining the written consents of property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines one hundred and fifty feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank or tanks is or are to be installed, provided, however, that for the purpose of this section only the frontage of any such lot or plot of ground or that part of the frontage of any part of such lot or plot of ground as comes within the one hundred and fifty foot limit herein prescribed shall be considered.

"Whenever the lot or plot of ground in which such tank or tanks is or are to be installed is in any shape other than a rectangle the one hundred and fifty foot limiting line aforementioned shall not exceed in distance one hundred and fifty feet from any point in the boundaries of such lot or plot of ground.

"All petitions containing such consents of property owners shall be based on and contain the legal description of the property affected.

"No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of such lot or plot of ground are within two hundred feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theatre. Provided, however, that the provisions of this paragraph shall not apply to the installation of a tank or tanks containing any of the liquids mentioned in section 2667 having a flash point above one hundred and sixty-five degrees fahrenheit when such liquids are to be used for heating purposes in the building or buildings for which said tank or tanks are installed."

The following is the exception in paragraph (e) when frontage consents are not required:

"Frontage consents shall not be required for the installation of a tank or tanks containing any of the liquids mentioned in section 2667 when such liquids are to be used for heating purposes in the building or buildings for which such tank or tanks are installed or when such liquids are to be stored or sold within a garage building in connection with and incidental to the garage business therein conducted or where such liquids are used in a manufacturing plant and are essential to the manufacturing business therein conducted; provided, however, that where such liquids having a flash point below one hundred and sixty-five degrees fahrenheit are sold or offered for sale outside of a garage building or any other building such location shall be construed to be a filling station within the meaning of section 3273 of the Revised Chicago Code of 1931 and shall require frontage consents in accordance with section 2670 of said code."

FLAMMABLE LIQUIDS USED FOR DRY CLEANING PURPOSES

(No. 9303—Division Marshal in Charge of Fire Prevention—
E.L.M.—October 8, 1936—5 pp.)

The Division Marshal in Charge of Fire Prevention should prevent, except in buildings constructed in accordance with the dry cleaning licensing ordinance, the use for dry cleaning purposes of gasoline, naphtha, benzine, and all other liquids that are in fact volatile flammable oils, regardless of their flash point, trade name, or whether they fall into the same chemical group.

Citations:

Ordinance: Code '31: 3393, 3397.

Cases: Standard Oil Co. v. Kamradt, 319 Ill 51 (1926).
Fenske Bros. v. Upholsterers' Union, 358 Ill 239 (1935).
City of Fairfield v. Pappas, 362 Ill 80 (1936).
Condon v. Chicago, 249 Ill 596 (1911).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with memorandum raising a question as to the construction and application of section 3393 of article X of the Revised Chicago Code of 1931 commonly known as the dry cleaning ordinance. The concluding paragraph of your letter reads as follows:

"Will you kindly advise this office whether or not we are within our jurisdiction in refusing to permit the use of flammable liquids, regardless of its flashpoint or trade-name, for dry cleaning purposes except in buildings constructed as set forth in Section 3397 in the Chicago Code of 1931."

Section 3393 of the said article X is as follows:

"3393. *License required.*) It shall be unlawful for any person, firm or corporation to engage in or carry on within the city of Chicago the business of dry cleaning or spotting, in which gasoline, naphtha, benzine or other volatile flammable oils are used to clean or renovate any clothing or articles of wearing apparel or any fabric of any kind, without first obtaining a license, as hereinafter provided, for each dry cleaning or spotting establishment proposed to be conducted by such person, firm or corporation."

In questioning your interpretation and application of the ordinance, your correspondent after quoting section 3393 says:

"The provisions of Article X do not apply to our client. Article X applies only to persons, firms or corporations using 'gasoline, naphtha, benzine or other volatile flammable oils' for cleaning purposes. Our

client does not use 'gasoline, naphtha, benzine or other volatile flammable oils' in cleaning. The solvent used by our client is not gasoline, it is not naphtha and it is not benzine. It does not come under the general language 'other volatile flammable oils.' Under the well known doctrine of construction *ejusdem generis* this general language can apply only to other volatile flammable oils similar to gasoline, naphtha and benzine. This rule of construction is in full force in Illinois and our Supreme Court has consistently applied it in cases where similar language to that contained in Article X has been in question. The general words 'or other volatile flammable oils' following the particular and specific words 'gasoline, naphtha, benzine' will be restricted to such similar oils as the specific words embrace. This ordinance, therefore, applies only to those using gasoline, naphtha or benzine or some other volatile flammable oil of the same class. The ordinance will cover only liquids with a flash point not exceeding 50 degrees Fahrenheit closed cup tester. The solvent used by our client has a flash point in excess of 135 degrees Fahrenheit closed cup tester."

Your correspondent in his interpretation of the ordinance ingeniously seeks to restrict the meaning of the word "flammable" as used in section 3393 by confining its application to a particular or specific kind of cleaning fluid and by reading into the ordinance certain tests such as the "flash point" of the liquid used.

The words "flammable" and "inflammable" are defined synonymously in our standard dictionaries and are used interchangeably. Webster defines "flammable" as "inflammable" and Century gives the meaning as "Capable of being kindled into flame; inflammable." "Inflammable" is defined by both as "Capable of being set on fire." No dictionary limits or qualifies the meaning of the words. If a liquid will ignite or can be set on fire it is flammable (inflammable). The word "volatile" is defined by Webster as "readily vaporizable," and by Century as "having a quality of taking flight or passing off by spontaneous evaporation."

A fundamental rule in the interpretation of statutes and ordinances is to construe them according to the sense of the terms and the intention of the legislative body. The meaning is to be sought in the words primarily, and in case of ambiguity or doubt, in the context, the subject matter, and the reason and purpose of the ordinance. Words are generally to be understood in their usual and most known signification unless they have acquired a technical meaning, and then it is the office of interpretation to determine, by reference to the context, the subject matter, and the circumstances under which they are used, whether such words are employed in the ordinary or in a technical sense. When the words are plain and free from ambiguity and of themselves convey a distinct and perfect idea they require no interpretation; and interpretation should only be indulged from a clear necessity, either to escape some absurd consequences or to guard against some fatal evil.

In the construction of statutes and ordinances this rule has been expressed by the Illinois Supreme Court in a great number of cases among which are the following:

"It is said that whenever the meaning of a word used in a statute or ordinance becomes a subject of controversy in a legal proceeding, the ascertainment of its strict primary signification is not so much a matter of importance as the sense in which it was used by the legislative body, and that the latter must control even though the word has been used without regard to its appropriate and primary meaning, where such intention appears from the act or ordinance. This is the rule, *City of Springfield v. Green*, 12 Ill 269." (*Standard Oil Co. v. Kamradt*, 319 Ill 51, at page 53).

"* * * Statutes are to be interpreted according to their intent and meaning. *Condon v. City of Chicago*, 249 Ill. 596; *Canal Commissioners v. Sanitary District*, 184 Ill. 597." (*Fenske Bros. v. Upholsterers Union*, 358 Ill 230, at page 246).

"* * * and in the construction of a statute for the purpose of ascertaining its meaning the object sought to be accomplished is an important factor meriting full consideration. *Strauss v. City of Galesburg, supra*." (*City of Fairfield v. Pappas*, 362 Ill 80, at page 84).

"* * * It is, however, a rule in the interpretation of statutes that they are to be interpreted according to the intent and meaning and not always according to the letter; that a thing within the letter is not within the statute unless within the intention, and that a construction which leads to an absurd consequence is to be avoided. * * *" (*Condon v. City of Chicago*, 249 Ill 596, at page 598).

An examination of the article and section referred to discloses that the words used in the ordinance are plain and free from ambiguity and of themselves convey a distinct and perfect idea. If there were any ambiguity here, an examination of the context and the subject matter clearly reveals the purpose of the ordinance. The intention of the City Council in enacting this ordinance was clearly for the purpose of protecting life and safeguarding persons and property from injury resulting from the unrestricted use of explosive and flammable liquids in the business of cleaning wearing apparel.

We are of the opinion, therefore, that it is your duty to prevent the use of gasoline, naphtha, benzine and all other liquids that are in fact volatile flammable oils, regardless of their flash point, trade name or whether they are blood relatives of gasoline, benzine and naphtha or have been taken into that family by adoption, for dry cleaning purposes except in buildings constructed as provided in section 3397 of the Revised Chicago Code of 1931.

EXEMPTION OF UNHEATED GARAGES FROM INSTALLING SPRINKLERS

(No. 9441—Alderman, First Ward—A.F.G.—February 23, 1937
—2 pp.)

An amendment to the Revised Chicago Code of 1931 which would exempt unheated public garages from the requirement

of installing sprinklers cannot be drawn so as to be held valid by the courts, as a public garage is a place of employment required to be heated. Such an ordinance as has been proposed would violate the rule of uniformity and would necessitate the making of an unreasonable classification not based on any reasonable distinction.

Citation: Code '31: 1209, 2225, 2483, 2558.

OPINION OF FOREGOING SYNOPSIS

You * * * requested us to prepare an amendment to the Revised Chicago Code of 1931 which would exempt unheated public garages from the requirement of installing sprinklers.

An unheated public garage, even if equipped with a sprinkler system, would be in violation of the Code. A public garage is a place of employment and section 2225 of the Code requires the owner of any place of employment to maintain not less than 68 degrees of heat between the hours of 8 A.M. and 6 P.M. from October 1st of each year to June 1st of the succeeding year. The requirements of sections 1209 and 2483 of the Code that all public garages which are not of fireproof construction throughout shall be sprinklered were enacted to prevent the spread of fire because of the volatile nature of the gasoline used as the motive power of automobiles which are therein stored and not because of the presence or absence of heating apparatus.

Section 2558 prohibits the use of stoves or furnaces in any building in which is housed one or more self-propelled vehicles or other wheeled machine containing in the tanks thereof any volatile flammable liquid for fuel or power. Heating shall be by hot water or steam. Hot water or steam boilers, where used, shall be enclosed in a room having no opening or openings except to the outside of the building, and requires that the boiler room shall have walls, ceilings and floors of brick or concrete. So practically, insofar as the necessity of sprinklers is concerned, there would be no difference between a garage in which no heating apparatus is installed and one in which the heating unit is installed in compliance with section 2558 in a separate and isolated part of the building. An ordinance requiring sprinklers in one case and not in the other would violate the rule of uniformity and be void.

An amendment to section 2225 would be necessary to make your suggested change effective. To provide that a garage in which no heating apparatus is installed is not a place of employment while a garage in which heating apparatus is installed in conformity with section 2558 is a place of employment would be an unreasonable classification not based on any reasonable distinction and would not be sustained by the courts.

For the foregoing reasons we are of the opinion that a valid ordinance cannot be drawn to accomplish the purpose you desire.

E. MOTOR VEHICLES³

USE OF PRIVATE PROPERTY FOR AUTOMOBILE INSPECTIONS

(No. 9219—*Public Vehicle License Commissioner—M.H.F.—*
July 3, 1936—31½ pp.)

Under the ordinance providing for a semi-annual inspection of all motor vehicles owned or operated by residents and corporations of the City, the inspections must be performed at an official municipal inspection station under the supervision of the City Public Vehicle License Commissioner.

The Public Vehicle License Commissioner may establish municipal inspection stations on private property with the consent of the owner or occupant, and use privately owned testing equipment which is suitable and accurate. Such stations, however, must be open to all and not to just one owner or group of owners.

Separate stations may be established for the testing of motor trucks only or for passenger vehicles only.

Citation: Code '31: 2061B-2061M.

OPINION OF FOREGOING SYNOPSIS

Your letter of June 29, 1936, invites our attention to the ordinance passed by the City Council October 30, 1935, effective July 1, 1936, which ordinance requires the semi-annual inspection at municipal testing stations in Chicago of all motor vehicles owned or operated by residents of the City or corporations having their principal offices or places of business in the City. You state that the inspections are to be made in conjunction with the Chicago Park District and that WPA personnel assigned to the Park District will be employed on the inspection lanes. You further tell us that you have received numerous inquiries from business people in Chicago who operate large numbers of motor vehicles in connection with their businesses requesting that they be given permission to have their vehicles inspected on privately owned lanes which, in some instances, are equipped with the same inspection equipment as is used on the municipal lanes, these inspections to be supervised by the city of Chicago. It is stated that by adopting this procedure the business of these concerns would not encounter the interruption necessarily met with in sending their vehicles to the various municipal

³ With regard to the licensing and inspection of motor vehicles owned by the Federal government, see Opinions No. 9598, 9351, 9011, and 9010, pp. 307-309 of this volume.

testing lanes. Our advice is sought upon the question whether or not the ordinance will permit such a procedure.

The ordinance referred to is found as article V, chapter 39 of the Revised Chicago Code of 1931, as amended, and consists of code sections numbered 2061-B to 2061-M, inclusive.

Section 2061-B makes it mandatory that the inspection provided for be made "at one of the municipal testing stations in said city." Section 2061-C requires that the inspection shall be conducted under the direction of the Public Vehicle License Commissioner of the city of Chicago. Section 2061-H provides as follows:

"No person, firm or corporation shall in any manner represent any place as an official inspection station other than official inspection stations established by the city of Chicago."

From our study of the above mentioned sections and the other sections of the ordinance we find nothing therein which prevents you from establishing municipal testing lanes on private property with the consent of the owner or occupant and nothing which requires the municipal inspectors operating under your supervision and control from using suitable and accurate privately owned testing equipment. However, it is apparent that the inspection is to be a public inspection made by the Public Vehicle License Commissioner and that it should not deteriorate into a private inspection to be adopted by you as the inspecting authority. Furthermore, all members of the motor-using public affected by the ordinance should be given equal opportunity to comply with its provisions and the enforcement of the ordinance should not be handled in such a manner that favoritism and unlawful discrimination would result. We would not regard it proper for you to permit your inspection personnel to serve exclusively the interests of a single owner or group of owners of motor vehicles or for you to establish an inspection station for the exclusive use of one owner or group of owners, though no objection is seen to establishing stations for the testing of trucks only or passenger vehicles only. We deem it to be a matter of importance that all members of the motor-using public be accorded equal rights and privileges under the ordinance, though we are not unmindful of the resulting convenience that might be found by companies operating a large number of motor vehicles finding a way to have their vehicles promptly inspected at such times and places as would not interfere with their business.

In case you should use privately owned premises or testing equipment the City should be protected against after-asserted claims for damages or the value of the occupancy or use. Among the other matters for your consideration which occur to us at this time are possible traffic congestion that may occur, injuries to pedestrians when vehicles cross sidewalks, and plans to protect the public against racketeers who may be met with in the guise of operators of gasoline filling stations, automobile repair shops and accessory dealers, who might seek to have established testing stations in connection with their premises for the selfish purpose of corrupting inspectors or forcing the sale of automotive parts and supplies and putting motorists under obligation to engage them to perform repair work. Dealers in motor vehicles, parts and supplies will doubtless reap a pecuniary benefit from the ordinance, but it would be undesirable to permit unscrupulous ones to impose upon the public.

INSPECTION OF MOTOR VEHICLES

(No. 9277—*Public Vehicle License Commissioner—J.F.G.—September 14, 1936—2½ pp.*)

The state of Illinois has the right to designate public garages in the City as official State inspection stations, but an inspection by such a station is not sufficient to comply with the City's compulsory inspection ordinance for the station cannot issue a certificate of approval as required by the City ordinance.

A resident of the City who has secured a certificate of approval pursuant to the City ordinance requiring inspection of motor vehicles is not required to submit his car for inspection at an official State inspection station.⁴

Citations:

- Statutes: ISBS '35, 121: 398.
Motor Vehicle act, sec. 21c.
Ordinance: Coun. J. (1935-36), p. 824.

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of September 9, 1936, in which you request our opinion on the following questions relating to the inspection of motor vehicles:

1. Has the state of Illinois the right to designate public garages within the city of Chicago as official inspection stations?
2. If the State has such authority, will inspections by such public garages be sufficient compliance with the compulsory inspection ordinance of the city of Chicago?
3. If a resident of Chicago receives a certificate of approval for his car after inspection, is he required to submit the same car for inspection by an official inspection station designated by the state of Illinois to comply with the State law?

1. By virtue of section 123 of the Uniform Act Regulating Traffic on Highways (Illinois State Bar Statutes, 1935, chap. 121, par. 398) it is provided that any public garage having complied with the manual of rules and regulations adopted by the Department of Public Works and Buildings of the state of Illinois shall be recognized as an official inspection station. Nowhere in the act is there any requirement for submitting any motor

⁴ The Illinois Supreme Court in *City of Evanston v. Wazau* [364 Ill 198 (1936)] upheld the motor vehicle inspection ordinance of the city of Evanston which is similar to the ordinance of the city of Chicago.

vehicle for inspection. The only compulsory inspection provision is in section 21c of the motor vehicle law which authorizes cities having a population of 40,000 or more inhabitants to require by ordinance that motor vehicles be inspected. The provision in the Uniform Act Regulating Traffic on Highways authorizing the designation of official inspection stations and the provision in the motor vehicle law for compulsory inspection in cities of 40,000 or more inhabitants are not conflicting. The State has the right to designate public garages in the city of Chicago as official inspection stations. No person is compelled to submit his car for inspection at any such State official inspection station.

2. By virtue of the ordinance passed by the City Council of the city of Chicago on October 30, 1935 (*Coun. J.*, p. 824), every resident of Chicago must submit his motor vehicle for inspection by the City authorities. An inspection by a public garage designated as a State official inspection station is not sufficient since such station is not permitted to issue a certificate of approval as provided by the ordinance.

3. Since there is no provision for compulsory inspection of motor vehicles, except pursuant to an ordinance in cities having a population of 40,000 or more inhabitants, a resident of the city of Chicago who has secured a certificate of approval pursuant to the ordinance passed October 30, 1935, is not required to submit his car for inspection at an official inspection station designated by the state of Illinois.

INSPECTION OF PUBLIC UTILITY MOTOR VEHICLES

(No. 9640—*Commissioner of Police—J.H.S.—October 15, 1937*
1½ pp.)

The City's ordinance providing for the inspection of motor vehicles does not require inspection of motor vehicles which are operated by public utilities engaged in the transportation of property for hire, as the Illinois Commerce Commission is vested with the power to compel such utilities to maintain their equipment in safe condition.

Citation: Code '31: 2061b.

PROHIBITION OF SALE OF AUTOMOBILES ON SUNDAYS

(No. 9628—*Secretary, Committee on Judiciary and State Legislation—M.H.F.—October 4, 1937—3½ pp.*)

An ordinance which makes it unlawful to sell, barter, exchange, or demonstrate any motor vehicle on Sunday and certain other holidays, or to keep open a place of business for such purposes on those days, would be invalid under the decisions of the courts

on the ground that there is no substantial difference between the business done by automobile salesmen and the businesses of the sellers of many other kinds of property that would justify the prohibition of sales on Sunday by automobile salesmen and not by other sellers.

Citations:

Ordinance: Code '31: 3002.

Cases: *McPherson v. Village of Chebanse*, 114 Ill 46 (1885).
City of Springfield v. Richter, 257 Ill 578 (1913).
City of Clinton v. Wilson, 257 Ill 580 (1913).
Eden v. People, 161 Ill 296 (1896).
City of Marengo v. Rowland, 263 Ill 531 (1914).

Other reference: Op. Corp. Coun. (1924-25), p. 161.

OPINION OF FOREGOING SYNOPSIS

We have examined the form of proposed ordinance transmitted with your communication of September 30, 1937, which ordinance makes it unlawful for any person to sell, barter, exchange or demonstrate any motor vehicle, whether new or second-hand, on the first day of the week, commonly called Sunday, or on certain holidays designated in the ordinance, or to keep open his or its place of business on such days. Our opinion is requested as to the validity of such ordinance.

This department, considering section 3002 of the Revised Chicago Code of 1931, which section prohibits the sale of fresh meats on Sundays and legal holidays, expressed the view that the section was invalid (*Opinions of the Corporation Counsel*, 1924-1925, p. 161).

In *McPherson v. Village of Chebanse*, 114 Ill 46, the court held that under its general police power the village had a right to pass an ordinance prohibiting the keeping open of places of business on Sunday for the sale of goods. In *City of Clinton v. Wilson*, 257 Ill 580, the court held that under section 66, the police power section, the City was authorized to pass an ordinance prohibiting anyone from engaging in the business of vending goods, wares and merchandise on Sunday. The ordinance under review prohibited the keeping open on Sunday any billiard room, ball or pin alley, baseball grounds, or other places of amusement. The ordinance contained a provision that it should not be applicable to persons who conscientiously observed some other day of the week as the Sabbath, nor in cases of necessity or charity, nor to hotels, eating houses, drug stores, tobacco stores, barber shops or livery stables. Wilson conducted a motion picture theater. To the objection that the ordinance discriminated between persons of the same class and because it was special legislation the court held that a law is general, not because it embraces all the governed, but that it may from its terms, when many are embraced in its provisions, embrace all others

when they occupy like positions to those who are embraced. It thought that a substantial difference existed in the classes of employment and business embraced within the prohibition and those excepted from it.

City of Springfield v. Richter, 257 Ill 578, upheld an ordinance prohibiting persons from keeping open their places of business or pursuing their daily occupations on Sunday, which ordinance exempted from its prohibition hotels, eating houses, drug stores, tobacco stores, livery stables, and street cars.

The cases of *Eden v. People*, 161 Ill 296, and *City of Marengo v. Rowland*, 263 Ill 531, declared invalid ordinances making it unlawful to operate barber shops on Sunday. In the *Eden* case the court said:

"... If the public welfare of the State demands that all business and all labor of every description, except works of necessity and charity, should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day. All will then be placed on a perfect equality, and no one can complain of an unjust discrimination. But when the legislature undertakes to single out one class of labor harmless in itself, and condemn that and that alone, it transcends its legitimate powers, and its action cannot be sustained."

In the *Rowland* case the court reviewed its earlier decisions in the *Eden*, *McPherson*, *Richter* and *Wilson* cases and held that an ordinance applicable to a certain class or classes of citizens, to be constitutional, must be based upon some substantial difference between the citizens of such class or classes and other individuals or classes to which it does not apply. It pointed out that in the *Eden* case it also held that there was no substantial difference in the business done by barbers from that done in many other lines of employment, while in the other cases it was held that there was a substantial difference existing in the classes of employment and business embraced within the prohibition in the ordinance and those exempted from such prohibition.

Applying the decisions of our courts, we can see no substantial difference between the business done by automobile salesmen and that done by the sellers of many other kinds of property. Our opinion therefore is that the ordinance would be invalid.

The following opinions hold substantially the same as the above opinion:

No. 9717 — Chairman, Committee on Health — M.H.F. — December 4, 1937—1½ pp. (bakery goods).

No. 9719—Alderman, Ninth Ward—A.F.G.—December 6, 1937—1½ pp. (fresh meat).

F. WEAPONS

TRANSPORTATION OF WEAPONS

(No. 9461—Acting Commissioner of Police—R.N.—March 19, 1937—21½ pp.)

There is no prohibition against the carrying or transporting of weapons if done in an open manner and without concealment.

Citations:

Statute: Act Revising the Law Relating to Deadly Weapons (1925), sec. 4.
Ordinance: Code '31: 3425, 4204.

OPINION OF FOREGOING SYNOPSIS

You ask to be advised as to how you should reply to the inquiry of Mr. B——, U.S.N.R. Armory, who inquires as to the restrictions regarding the possession and carrying of rifles. His inquiry reads "the reason for this request is that I am considering the purchase of an automatic pistol to protect myself when carrying considerable amounts of money between a bank and the naval armory. Then, too, several members of this division are contemplating purchases of target pistols and rifles to be used at the armory and in the police rifle and pistol range in Soldier's Field * * * but going to Soldier's Field will require them to carry their guns about."

We suggest that you call to the attention of Mr. B —— the provisions of section 3425 of the Revised Chicago Code of 1931 which reads as follows:

"3425. *Permit to purchase weapon required.*) It shall be unlawful for any person to purchase any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character, which can be concealed on the person, without first securing from the commissioner of police a permit so to do. Before any such permit is granted, an application in writing shall be made therefor, setting forth in such application the name, address, age, height, weight, complexion, nationality and other elements of identification of the person desiring such permit, and the applicant shall present such evidence of good character as the commissioner of police at his discretion may require.

"It shall be the duty of the commissioner of police to refuse such permit to all persons having been convicted of any crime, and all minors.

"Otherwise, in case he shall be satisfied that the applicant is of good moral character, it shall be the duty of the commissioner of police to grant such permit, upon the payment of a fee of two dollars."

We also call to your attention section 4 of "an Act revising the law relating to deadly weapons" (1925) which reads in part as follows:

"Sec. 4. No person shall carry concealed on or about his person a pistol, revolver or other firearm * * *."

In line with this provision of the statute, section 4204 of the 1931 Code also provides:

"It shall be unlawful for any person, within the city, to carry or wear under his clothes or concealed about his person any pistol, revolver * * *".

You will note that the provisions of both the statute and the ordinance relates solely to *concealed* weapons; there is no prohibition against the transporting of weapons if it is done in an open manner without concealment on or about the person.

PROHIBITION OF CONCEALED WEAPONS

(No. 9135—C.N.—April 23, 1936—1½ pp.)

No constitutional rights are violated by laws and ordinances prohibiting the carrying of concealed weapons.

Citations:

Constitution: United States, Second Amendment.

Statutes: ISBS '35, 38: 143, 144.

Ordinances: Code '31: 4204-4209.

RESTRICTION OF SALE OR DISTRIBUTION OF TOY WOODEN GUNS

(No. 9108—Commissioner of Police—C.N.—March 30, 1936—2½ pp.)

Under existing laws, no steps may be taken by the Commissioner of Police to prevent the sale or distribution of toy wooden guns that cannot be discharged, but which because of their exact resemblance to real revolvers may be effectively used in holdups.

Citations:

Ordinance: Code '31: 4005.

Other references: 15 Op. Corp. Coun. 677.

16 Op. Corp. Coun. 411.

OPINION OF FOREGOING SYNOPSIS

We have your communication of March 20, 1936, in which you quote the contents of a letter you received from Mr. R— assistant superintendent (of the) Juvenile Detention Home relating to a newspaper advertisement offering a replica of Tom Mix's Six Shooter, i. e. revolver, to any boy or girl sending in ten cents and the top of a cereal package.

In the advertisement the wooden gun is said to be an exact model of the movie star's favorite weapon; of the same size, colored steel-black with ivory handle and a cylinder that turns like that in a real revolver. Mr. R— states that steps should be taken to stop the distribution of this imitation gun which he describes as "a very dangerous although harmless weapon" and expresses the fear that if boys between the ages of fourteen and seventeen get hold of these imitation weapons and decide to use them for holdups, the effect would be precisely the same in most instances as if real death dealing weapons were used. He states that in his connection with the Juvenile Home he knows of numerous instances where delinquent children got into serious difficulties with wooden and tin guns in their possession. You ask for an expression from us as to what you can do in the premises.

The question presented formed the basis of opinions rendered by this department to your predecessors, Morgan A. Collins and Michael Hughes on March 10, 1927, and December 17, 1927, one relating to display for sale of a toy gun made to resemble a firearm, the other regarding so-called "cigarette guns", (See *Opinions of the Corporation Counsel and Assistants*, vol. 15, p. 677, and vol. 16, p. 411.) In both these opinions the conclusion was reached that no provision could be found in State statutes or City ordinances under which you would be justified in restricting the sale or distribution of the articles described.

Section 4005 of the Revised Chicago Code of 1931 which prohibits the possession of any toy pistol for the purpose of discharging the same cannot be used as a basis for banning the imitation revolver described, because the toy gun obviously cannot be discharged. The section referred to is embraced in chapter 112 entitled "Fireworks" and is captioned "Fireworks, toy guns, etc., prohibited", the implication being inescapable that the section contemplated only such toy guns as could be provided with explosives; that public safety features relating directly to dangers inherent in use of the toy, not the remote possibilities of improper use by delinquents, inspired the ordinance.

It is our opinion that under existing laws no steps may be taken by you to prevent the sale or distribution of the toy guns described in the advertisement.

* * * * *

PROHIBITION OF USE OF AIR RIFLES WITHIN CITY

(No. 9505—Chairman, Committee on Judiciary and State Legislation—J.F.G.—April 28, 1937—1 p.)

A proposed amendment to the Revised Chicago Code of 1931 which prohibits the discharge within the City of rifles or guns that discharge projectiles by air, spring, or any force other than an explosive substance, is broader than the power granted to the City Council "to regulate, restrain and prohibit the use of

fireworks, firecrackers, torpedoes, Roman candles, skyrockets, and other pyrotechnic displays.”

Citations:

Statute: Cities and Villages act, art. V, sec. 65.
Ordinance: Code '31: 4005.

G. GAMBLING AND LOTTERIES

BANK NIGHT⁵

(No. 9378—*Commissioner of Police—W.V.D.—December 19, 1936—1 p.*)

Bank Night, Screeno, and Rolleo Night constitute a chance distribution of money or gift within the prohibition of the Revised Chicago Code of 1931, even though no additional charge is imposed for the privilege of participating in the games.

Citation: Code '31: 1901.

CITY COUNCIL AUTHORIZATION OF “BANK NIGHTS”

(No. 9501—*Subcommittee of Committee on Judiciary and State Legislation—W.V.D.—April 22, 1937—1½ pp.*)

As the General Assembly by a provision of the State Constitution has no power to authorize “bank nights”, which the State Supreme Court has held to constitute a lottery, such authorization is also beyond the power of the City Council.

Citations:

Constitution: Illinois, art. IV, sec. 27.
Case: Iris Amusement Corporation v. Kelly, 366 Ill 256 (1937).

TRADE STIMULATING DEVICE AS GAMBLING MACHINE

(No. 9129—*W.V.D.—April 20, 1936—4½ pp.*)

A trade stimulating device which returns for each coin inserted at least one trade check that may be exchanged for a

⁵ The Supreme Court of Illinois ruled similarly in *Iris Amusement Corporation v. Kelly*, 366 Ill 256 (1937).

trade value equal to the value of the coin inserted, and which also at various times returns more than one trade check, the frequency and value of which depend on the percentage of his ordinary profits which the merchant is willing to yield to stimulate play, is a gambling device and no license may be issued for the device.

Citations:

Ordinance: Code '31: 4193a-4193h.

Case: Thomas v. People, 59 Ill 160 (1871).

OPINION OF FOREGOING SYNOPSIS

In your letter of April 6, 1936, you request information as to whether a City license is required for the operation of a coin receiving chute device, a picture of which is attached to your letter, and if so by virtue of what ordinance and the amount of the yearly license fee for each machine.

In reply thereto, please be advised that the ordinance of the city of Chicago licensing and regulating automatic amusement, vending or weighing machines reads (in part) as follows:

"4193a. *Definition.*) The term 'automatic amusement, vending or weighing machine' as herein used means and includes any mechanical device or machine the operation of which is governed or controlled by the deposit of a coin or token.

"4193b. *Gambling Prohibited.*) No person, firm or corporation shall keep, maintain, use or operate, or cause or permit any of his or its agents or employes to keep, maintain, use or operate any automatic amusement, vending or weighing machine upon, in, by or through which money or other valuable thing is staked or hazarded or prizes or premiums are offered or awarded by any chance action of such machine or the operator thereof.

"4193c. *Annual License.*) It shall be unlawful for any person, firm or corporation to keep, maintain, use or operate or cause or permit any of his or its agents or employes to keep, maintain, use or operate any automatic amusement, vending or weighing machine for the purpose of permitting play of a game of skill or amusement, or for the purposes of delivery of merchandise, tokens or orders for merchandise, or for the purpose of registering the weight of persons or things without first obtaining a current calendar year's license therefor as hereinafter provided."

You state in your letter that the machine is designed solely as a trade stimulator. Each time it is operated the customer receives a trade check which may be exchanged for a trade value equal to the value of the coin inserted in the chute. A certain number of checks ejected will be premium checks redeemable in trade for the advertised merchandise appearing in the window on the play on which such premium check is received. The frequency and value of these premium checks depends on the percentage of

his ordinary profits the merchant is willing to yield to stimulate play; but each time the trade hopper is filled it must carry at least one trade check for each premium denomination.

From the above facts it appears that while the player may receive the intrinsic value of each coin inserted in the device, others receive more depending upon the chance action of the machine which makes it a gambling transaction. (*Thomas v. People*, 59 Ill 160).

It is therefore our opinion that the machine used in the manner as described in your letter makes it a gambling device within the meaning of the ordinance of the city of Chicago and the statutes of the state of Illinois and that no license may be issued for the same.

LICENSE FOR DEVICE DISCHARGING TOKENS

(No. 9094—Commissioner of Police—W.V.D.—March 11, 1936—
4 pp.)

The purpose in having a device known as an "Electric Eye Shoot the Bull" discharge tokens in numbers varying upon the chance operation of the device is to appeal to the gambling instinct of the individual playing the machine, and the Commissioner of Police, in passing upon an application for an automatic amusement machine license for such a device, would be justified in concluding that these tokens would be exchanged for something of value, even though the tokens may assert on their face that they are of no value and cannot be redeemed.

Citations:

- Ordinance: Code '31: 4193B, 4193C, 4193D.
Cases: Harvie v. Heise, 150 SC 277 (1928).
Gaither v. Cate, 156 Md 254 (1928).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of February 14, 1936, requesting an opinion in the matter of the application of M—— M—— for a license for a device known as "*Electric Eye Shoot the Bull*" in accordance with the provisions of 4193C of article 4 of the Revised Chicago Code of 1931 as amended February 1, 1933, please be advised that section 4193D provides as follows:

"*Application for license—approval.*) Before any license is granted for any automatic amusement, vending or weighing machine an application in writing shall be made therefor to the City Collector as required by ordinance governing the issuance of licenses. The applicant shall make

available for examination by the Commissioner of Police or officer designated by him the machine for which application for license has been made. If such machine is not obviously a gambling device and sufficient and satisfactory evidence shall be furnished as to the character and reputation of the applicant, the place in which such machine is to be located and the nature of the business therein conducted, to determine that such machine will not likely be kept, maintained, used or operated in violation of the laws of the State of Illinois and the ordinances of the City of Chicago, the Commissioner of Police shall approve the application for license."

In accordance with the provisions of the above section an application for a license for an automatic amusement machine is addressed to the sound discretion of the Commissioner of Police to control the use of such machines which are not *per se* gambling devices so as to suppress gambling. The Commissioner of Police is vested with the power to determine first whether the machine for which a license is required is or is not obviously a gambling device, and if not, then the Commissioner of Police has a broad discretion to determine if the particular machine will likely be used for gambling from the character and reputation of the applicant, the place in which such machine is to be located, and the nature of the business therein conducted. Section 4193B of the Code provides:

"Gambling prohibited.) No person, firm or corporation shall keep, maintain, use or operate, or cause or permit any of his or its agents or employes to keep, maintain, use or operate any automatic amusement, vending or weighing machine upon, in, by or through which money or other valuable thing is staked or hazarded or prizes or premiums are offered or awarded by any chance action of such machine or the operator thereof."

The report of the captain of the 25th district attached to your letter states that "if operator made four hits and odd wheel stops on (say) ten the person receives ten tokens which are of no value and cannot be redeemed. In the front of the machine is a pay-off compartment where tokens are dropped."

It is difficult to reconcile this statement with the conclusion of the captain that it is a gambling device. The captain evidently meant that the tokens read that they are of no value and cannot be redeemed. While in several jurisdictions the courts have held in injunction proceedings that the police could not interfere with devices that discharged tokens of this kind unless it was shown by positive evidence that they were redeemed for something of value. However, the weight of authority is to the contrary.

In the case of *Harvie v. Heise*, 150 SC 277 at page 286, the Supreme Court said:

"In the light of these considerations, we think that the printing of the notices upon the brass checks, that they are of 'no value' and are intended solely for the amusement of the customer, is a mere subterfuge, never intended to be and not in fact acted upon, but intended only to apparently satisfy the letter of the law, while violating its spirit.

"In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the Courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.' *Moberly v. Deskin*, 169 Mo. App., 672, 155 S. W. 842.

"In addition to what has been said, even if it should be conceded that it is the sincere purpose of the owner, that the checks be played only for the amusement of the operator, we cannot say that they have no value whatever; for it must be that the amusement or entertainment furnished the player is worth something to him if it constitutes the inducement for him to operate the machine. It is idle to argue that he would spend his money and time in operating the machine for the purpose of obtaining something that is of no value to him—unless we impute to him the lack of that common sense which he is presumed to have. Further, especially in view of the high cost of amusement or entertainment and the immense sums paid for it by people of all classes, it is reasonable to suppose that the owners of the machines, if they expect the amusement or entertainment furnished to operate as an inducement to play, must consider it of some value to the operator. In addition, it is apparent that some cost or expense is necessarily incurred in the manufacture and distribution of these checks or tokens, and the simple assertion that they are of 'no value' does not establish that fact."

This view of the law has also been expressed in the case of *Gaither v. Cate*, 156 Md 254.

In our opinion the purpose of having tokens discharged in varied numbers upon the chance operation of the device is to appeal to the gambling instinct of the individual playing the machine, and the Commissioner of Police would be justified in concluding that these tokens would be exchanged for something of value.

SHOOTING GALLERY GAME AS GAMBLING

(No. 9295—Commissioner of Police—W.V.D.—September 30, 1936—31½ pp.)

A game in which the patrons of a shooting gallery contribute to a pot, a percentage of which goes to the house and the rest to the person who shoots out a certain red numeral, violates the Illinois statute on gambling. The fact that skill may be a

factor does not except such a game from the statute prohibiting gambling.

Citations:

Statute: ISBS '35, 38: 298.

Cases: Swigart v. People, 154 Ill 284 (1895).

Tatman v. Strader, 23 Ill 439 (1860).

Question Game Co. v. Ploner, 273 Ill App 187 (1933).

People v. Weithoff, 51 Mich 203 (1883).

OPINION OF FOREGOING SYNOPSIS

In reply to your request of September 14, 1936, for an opinion as to the legality of giving a pot contributed by patrons of the shooting gallery by paying forty cents for twelve shots, thirty cents going to the house and ten cents to the pot, and the one who is successful in shooting out a red numeral 5 completely without leaving any signs of the red remaining receiving the pot, as more fully appears in the information attached to your communication, please be advised that the fact that skill may be a factor does not take it from within the purview of the statutes prohibiting gambling where the other elements are present viz., the paying of a consideration to participate in the transaction and the awarding of something of value to the winners. While the court in *Question Game Co. v. Ploner*, 273 Ill App 187, held when the element of skill, judgment, adroitness, or knowledge predominates over the element of luck or chance, the game cannot be said to be a gambling device within the meaning of the statute declaring such device or game to be unlawful, the weight of authority in this State does not coincide with this decision.

Paragraph 298 of chapter 38 of the Illinois State Bar Statutes, 1935, provides:

"Par. 298. *Gaming*.) Sec. 126. Whoever shall play for money or other valuable thing at any game with cards, dice, checks, or at billiards, or with any other article, instrument or thing whatsoever, which may be used for the purpose of playing or betting upon, or winning or losing money, or any other thing or article of value, or shall bet on any game others may be playing, shall be fined not exceeding \$100 and not less than \$10."

The words of the statute are "whoever shall play for money, or other valuable thing, at *any game* with cards, dice, checks or billiards, or with any other article, instrument or thing whatsoever * * *". The statute refers to any game whether of skill or otherwise. Justice Cooley in *People v. Weithoff*, 51 Mich 203, at p. 214 said:

"The word 'game' is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation or amusement."

The Supreme court in *Tatman v. Strader*, 23 Ill 439, at p. 440 stated:

"In our language, the word 'game' has a very broad and comprehensive signification. It means sport of any kind, and means physical contests

whether of man or beast, when practiced for the purpose of deciding wagers or rewards, or for the purpose of diversion, as well as games of hazard or skill by means of instruments or devices. Such were the Olympic and Nemean games among the Greeks, the former of which are lately being revived, and Apollinarian and Capitoline games among the Romans. A cock kept for fighting is called a game cock. A game man or animal of any kind, is one possessed of spirit and courage, and physical strength and endurance, qualifying him for personal contests. We might give illustrations almost endless, showing that the ordinary and popular understanding of the word gaming includes feats of physical power and skill, as a game of quoits, of ball, or of goal, the latter of which is played without any instrument, but depends on speed and skill alone. It may be that in some places games with cards and dice and the like, which are said to be followed by a kind of travelling professors, who are ranked with thieves and pickpockets, have so engrossed the public attention, that the more manly games, where physical prowess and skill determine the contest, that the latter are quite lost sight of or forgotten, and some may be so ignorant as hardly to know there are such games; but such we cannot presume was the case with the legislature which passed this law, nor can it alter the well-known meaning of the word used."

The Supreme Court followed this law in the case of *Swigart v. People*, 154 Ill 284.

Contests where the instruments used are guns come within the terms of the statute. The words of the statute viz., "playing at any game with cards, dice, checks or at billiards, or with *any other article, instrument or thing*" does not limit the article, instrument or thing referred to in the general words of the section to the same kind of articles, instruments or things specifically enumerated; it is apparent that gambling with any device is prohibited. The common ground of resemblance is the articles may be used for gambling. (*Swigart v. People*, 154 Ill 284.)

It is our opinion, therefore, that the awarding of money as described in your communication is in violation of paragraph 298 above set forth.

PRIZES TO PURCHASERS OF TICKETS TO POLICE FIELD MEET

(No. 9116—Commissioner of Police—W.V.D.—April 7, 1936—
3 pp.)

The sale of tickets for the annual police field meet with the additional inducement to participate in a drawing for prizes constitutes a lottery.

Citations:

Constitution: Illinois, art. IV, sec. 27.

Statute: ISBS '35, 38: 401.

Cases: Horner v. United States, 147 US 449 (1892).
Thomas v. People, 59 Ill 160 (1871).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of April 3, 1936, requesting an opinion as to whether the distribution of prizes by the Policemen's Benevolent Association of Chicago to certain purchasers of tickets to the annual police field meet, whose names are withdrawn by chance constitutes a lottery, please be advised that a lottery is defined as a scheme or plan for the distribution of prizes, either cash or merchandise by chance, where the participants have paid something of value for the privilege of engaging in the transaction. (*Horner v. United States*, 147 US 449.)

The fact that the purchasers of the tickets might receive entertainment intrinsically worth one dollar and that the motive prompting the promoters is a charitable one does not make it legal as stated in the case of *Thomas v. People*, 59 Ill 160, at page 164.

"Even if the ticket to the concerts and lectures and an engraving, were intrinsically worth \$5, the scheme would still be a lottery. The hand bill advertisement delivered with each ticket held out inducements to purchase. Each person who invested \$5 became entitled to a chance for \$50,000 in glittering gold, or \$25,000 in green backs, or a splendid residence in Chicago, or in Brooklyn, N. Y. The purchasers were thus incited to rivalry. Gold, which, in the estimation of some, opens all the avenues of pleasure, was the lure to incite the credulous and unsuspecting into this scheme.

"Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain, which gather around the gambling table?

"Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. This influence may not be so direct, and the immediate consequences so disastrous, as in some kinds of gambling, which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die. The temptations, however, are thrown in the way of a larger number, and a better class. The evil may spread more widely, and infect more deeply.

"It is said that the plan was undetermined, and that the wisdom of the 'advisory committee' would have devised one, just and equal. So chance is always undetermined. It neither forms nor designs. Intention is never attributed to it; its events are uncertain.

"The promise of the handbill, that the distribution shall be in a just and legal manner, is evasive. We are not bound to determine the intention from the language alone, but from all the facts, and the reasonable deductions from facts.

"The scheme itself is deceptive. If the engravings are worth \$1,000,000, and the presents \$200,000, then \$1,200,000, together with concerts and lectures, are given for \$1,000,000. This benevolence is too exalted and disinterested.

"Counsel argued that the object to be obtained is high and holy. To redeem an unfortunate class from ruin, degradation, and a fate worse than death, is a noble and Christian work. The laborers in such a cause deserve universal sympathy.

"The law does not manifest sympathy, but dispenses evenhanded justice. Enthroned in its majesty, it smiles and frowns upon all alike. Submission to its authority is incumbent upon all."

It is therefore our opinion that the sale of tickets for the annual field meet with the additional inducement to purchasers to participate in the drawing, as stated in your letter, constitutes a lottery within the meaning of section 27 of article 4 of the Constitution of the state of Illinois and is also in violation of section 401, of chapter 38 of the Illinois State Bar Statutes of 1935.

PERMIT TO SELL TICKETS ON A RAFFLE

(No. 9043—C.N.—February 7, 1936—1 p.)

The Mayor cannot grant a permit to a person to sell tickets in the City at ten cents each on a raffle of an automobile, as such a raffle is in reality a lottery prohibited by law.

Citations:

Ordinance: Code '31: 4185, 4186.

Case: United States v. Wallis, 58 Fed 942 (1893).

Other reference: Bouvier, Law Dictionary (Rawle's 3rd rev.), vol. 2, p. 2053.

H. LIQUOR

LOCAL OPTION REFERENDUM ELECTION

(No. 9124—City Clerk—M.H.F.—April 15, 1936—51½ pp.)

An election at which the voters of a precinct in a city, village, or incorporated town may vote on the sale of intoxicating liquor in their precinct is "an election at a time fixed by law for choosing city, village, or incorporated town officers," and only such an election.

The legal voters of a precinct within the City may file a petition requesting that a referendum vote be taken on the sale of intoxicating liquors in their precinct at the election to be held in November, 1936, at which judges of the Municipal Court are to be elected.

Citations:

Statutes: ISBS '35, 24: 51, 52, 299; 37: 397; 43: 1, 74, 75; 46: 1.

Cases: People ex rel. Egan v. Chicago, 310 Ill 534 (1924).

Franklin v. Westfall, 273 Ill 402 (1916).

People v. Olson, 245 Ill 288 (1910).

OPINION OF FOREGOING SYNOPSIS

Your communication of April 3, 1936, requests our opinion with reference to the definition of "election" contained in the State Dram Shops act in so far as the same relates to elections in the city of Chicago at which petitions may be filed with the City Clerk to submit to the voters of a precinct or group of precincts the proposition whether the sale at retail of alcoholic liquor shall be prohibited therein. You state that a question has arisen as to the election to be held in November, 1936, for county officers.

The pertinent provisions of the Dram Shops act are found in article IX thereof, chapter 43, Illinois State Bar Statutes, 1935. Section 1 of such article, as amended March 11, 1935, provides in part as follows:

"'Election' as used in reference to cities, villages and incorporated towns, shall mean an election at a time fixed by law for choosing city, village or incorporated town officers. 'Election' shall also mean an election at a time fixed by law for choosing county, township or road district officers. In case an election is to be held for officers of the city, village, incorporated town, township, or road district to which it is requested such proposition shall be submitted (or for the election of officers of a township or road district in which it is requested that such proposition be submitted to that part of a township or road district lying without the corporate limits of a city, village or incorporated town), not less than sixty days nor more than six months following the filing of such petition, then the words 'next ensuing election' as used herein shall mean the next ensuing election for officers of such city, village, incorporated town, township or road district, regardless of any intervening elections at which residents of such city, village, incorporated town, township or road district may vote."

Section 2 provides in part as follows:

"When any legal voters of a precinct or 'group of precincts' in any city, village or incorporated town of more than 200,000 inhabitants, * * * desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in such precinct or 'group of precincts,' they shall, at least 60 days before an election, file in the office of the clerk of such city, village or incorporated town, a petition as hereinafter provided * * *."

"In cities, villages and incorporated towns of 200,000 or less inhabitants* * *, such vote upon the question of prohibiting the sale at retail of alcoholic liquor shall be by the voters of the political subdivision as a unit. * * *

"In all townships or road districts (or in a part thereof where part of such township or road district lies within and a part without a city, village or incorporated town) lying without the corporate limits of a city, village or incorporated town, the vote of any such township, road district or said part thereof, shall be as a unit. * * *

Our study of the above quoted definition of the term "election" prompts the belief that "election," when used in reference to cities, villages, and incorporated towns, means "an election at a time fixed by law for choosing city, village, or incorporated town officers" and only such an election. The sentence reading, "'Election' shall also mean an election at a time fixed by law for choosing county, township, or road district officers," is not, in our opinion, used in reference to cities, villages, and incorporated towns, and does not enlarge the definition of the word "election" as used in the preceding sentence with specific reference to cities, villages, and incorporated towns.

The question next presented is whether the November, 1936, election is one fixed by law for the choosing of city, village, or incorporated town officers. At this November election to be held in Chicago, national, State, and County officers will be chosen, also judges of the Municipal Court of Chicago. The Illinois statute on elections, chapter 46, Illinois State Bar Statutes, 1935, fixes the day on which it will be held as the time for choosing electors of President and Vice-President of the United States, also representatives in Congress, United States senator, Governor, Lieutenant Governor, and certain other State officers, also certain County officials.

Section 1 of article IV of the Cities and Villages act, chapter 24, Illinois State Bar Statutes, 1935, provides as follows:

"A general election for city officers, shall be held on the third Tuesday of April of the year 1935 A. D., and every two years thereafter; *Provided*, that in cities which include wholly within their corporate limits a town or towns, such elections shall be held on the first Tuesday of April. *Provided, further*, that in cities which are located in counties under township organization, and which have adopted an Act to amend an Act entitled, 'An Act regulating the holding of elections and declaring the result thereof in cities, villages, and incorporated towns in this State,' approved June 19, 1885, in force July 1, 1885, as amended, such election shall be held on the first Tuesday in April; *provided, also*, that in cities in which the terms of aldermen expire in 1934, a general election shall be held on the day above provided in April, 1934."

Section 2 of the same article provides that a city clerk and a city treasurer shall be elected in each city when a mayor is elected.

Section 5 of part four of the act concerning the city of Chicago (article XII, chapter 24, Illinois State Bar Statutes, 1935) provides that general elections for aldermen shall be held in the year or years fixed by law for

holding the same on the last Tuesday in February of such year, and that any supplementary election for aldermen held under the provisions of the act shall be held on the first Tuesday of April next following the holding of such general aldermanic election.

The Municipal Court act contained in chapter 37, Illinois State Bar Statutes, page 1102, in section 9 thereof (p. 1104), fixes the first Tuesday after the first Monday in November as the time for the election of a chief justice and associate judges of that court. At the November, 1936, election a chief justice and certain associate judges of said court are to be elected. The Supreme Court of Illinois has held that the judges of the Municipal Court of Chicago are corporate authorities of the City with control, so far as the law has confided it to them, of the expenses of the court and with power to incur indebtedness on the part of the City for that purpose. (*People ex rel. Egan v. City of Chicago*, 310 Ill. 534). Also, in the cases of *Franklin v. Westfall*, 273 Ill 402, and *People v. Olson*, 245 Ill 288, the court held that a judge of a city court is a city officer.

The question is not entirely free from doubt and some claim might be made that the legislature intended the "wet" and "dry" proposition to be voted upon in cities, villages, or incorporated towns only at the general elections held in the month of April for the choosing of mayors, city, village, or town clerks and treasurers. However, because judges of the Municipal Court of Chicago have been held to be City officers and the forthcoming November election is a time fixed by law for their choosing, and for the further reason that we are required to liberally construe the State Dram Shops act to the end that temperance in the consumption of alcoholic liquors shall be fostered and promoted (section 1, article I, chapter 43, Illinois State Bar Statutes, 1935), our opinion is that the legal voters of precincts within the city of Chicago are entitled to file petitions requesting that referendum votes be taken on the "wet" or "dry" proposition at the forthcoming November, 1936, election.

PASSAGE UPON VALIDITY OF LOCAL OPTION PETITIONS

(No. 9209—Secretary, Committee on Judiciary and State Legislation—M.H.F.—June 30, 1936—5 pp.)

No court, body, or agency is designated by the existing Illinois Liquor Control act to pass upon the validity of petitions for the creation of dry or local option districts.

It is mandatory upon the City Clerk to receive, file and transmit to the Board of Election Commissioners every petition for the creation of dry or local option districts submitted in proper form and fulfilling the requirements of the Illinois Liquor Control

law. He has no authority to pass upon anything pertaining to the petition that is not a matter of form.

Citations:

Statute: ISBS '35, 43: 75, 77, 90.

Case: People ex rel. Giese v. Dillon, 266 Ill 272 (1915).

OPINION OF FOREGOING SYNOPSIS

Your communication of recent date states that our opinion is requested upon the question, what, if any, court, body or agency is vested with authority to pass upon the validity of petitions for the creation of dry or local option districts? In the event the existing law provides for no such reviewing body we are then requested to prepare an amendment to the State Liquor Control law providing for the creation of a body or agency with jurisdiction in the matter of such disputed petitions.

Article IX of the Illinois Liquor Control law (chapter 43, Illinois State Bar Statutes, 1935) provides the procedure to be followed in securing a referendum vote on the question whether the sale at retail shall be prohibited in a precinct or group of precincts. Section 2 of the article prescribes the filing, in the office of the clerk of the municipality, at least sixty days before an election, of a petition containing the signatures of not less than 25 per cent of the voters of the precinct or group of precincts, such percentage to be computed upon the basis of the total number of votes cast for Governor in the precinct or group of precincts at the general election held on November 8, 1932. When a municipality shall have adopted the provisions of "An Act regulating the holding of elections and declaring the result thereof in cities, villages and incorporated towns in this State," approved June 19, 1885, as amended, as was done by the city of Chicago, and when the precinct or group of precincts is located within such municipality, then the clerk with whom the petition is filed is required to deliver such petition, together with a certificate of the filing thereof, to the board of election commissioners of such municipality, and such board is required to conduct the election upon the proposition requested by the petition. The submission of the question by the proper authorities to the voters is made mandatory when the petition "in proper form shall have been filed with the clerk." Section 4 of the article prescribes the form of the petition and provides that it shall consist of sheets having such form printed or written at the top thereof and that it shall be signed by the legal voters in their own proper persons only, and opposite the signature of each legal voter shall be written his address (stating the street and house number if there be such) and the date of signing the same. It provides that no signature shall be valid or counted in considering such petition unless these requirements are complied with and unless the date of signing is less than six months preceding the date of filing. At the bottom of each sheet a statement is required, signed by a resident of the county in which the signers thereof reside, with his residence address, stating that the signatures on that sheet are genuine, and that to the best of his knowledge and belief the persons so signing were at the time of signing said petition legal voters in the political subdivision, precinct, or group of precincts, as the case may be, and that their

respective residences are correctly stated therein and that each signer signed the same on the date set opposite his name. The statement is required to be sworn to before some officer residing in the county authorized to administer oaths therein. Any person making the sworn statement who shall knowingly, wilfully, and corruptly swear falsely is deemed guilty of perjury. Whoever forges the signature of any person upon any such petition or statement is deemed guilty of forgery.

Section 17 of the article provides that any five legal voters of any precinct or group of precincts in which an election shall have been held as provided for in the act may within ten days after the canvass of the returns of such election and upon filing a bond for costs contest the validity of such election by filing a verified petition in the county court of the county in which the precinct or group of precincts is situated, setting forth the grounds for the contest. The county court is vested with final jurisdiction to hear and determine the merits of such cases.

From our study of the above mentioned article we have reached the conclusion that it is mandatory upon the City Clerk to receive, file, and transmit to the Board of Election Commissioners every petition submitted in proper form and fulfilling the requirements of the law and that the City Clerk has no authority to pass upon any matter pertaining to the petition except the matter be one of form. He has no authority to pass upon the question whether or not the signatures contained in the petition are genuine or whether the signers are legal voters of the precinct or group of precincts. He is vested with no judicial powers to determine the validity or sufficiency of a petition where it is necessary for him to use any judgment as to the voting qualifications of the signers. The case of *People ex rel. Giese v. Dillon*, 266 Ill 272, is in point. It involved a petition for an election under the old local option law. The court, in discussing the duties of the clerk, said on page 275 of its opinion:

"The town clerk is a ministerial officer. It was his duty to examine the petition, and if upon its face it appeared that it was not in compliance with the requirements of the statute he was not required to submit the question for a vote at the ensuing election. He, however, has no judicial powers, and where the petition presented appears on its face to be in compliance with the statute he cannot institute an investigation to determine whether the parties signing it were legal voters, whether they signed it in their own proper persons, whether the statement required to be made at the bottom of each sheet of the petition was made by a person authorized to make it, and whether it was sworn to before an officer authorized to administer an oath. The statute imposes the absolute duty on the clerk to submit the question to be voted upon when a petition is filed in compliance with the statute. He is given no discretionary power when a petition proper on its face is filed. His only function is to determine whether, upon the face of the petition, it is in compliance with the law. If it does not purport to be signed by the requisite number of voters of the town, if it does not purport to be signed by the voters in their own proper persons, and in other respects does not purport to conform to the requirements of the law, it would impose no duty upon the clerk to cause the question to be submitted at the election."

EFFECT OF PERMANENT REGISTRATION ACT ON SIGNERS OF LOCAL OPTION PETITIONS

(No. 9249—City Clerk—A.F.G.—July 31, 1936—4½ pp.)

Persons whose names appear on the old registers as well as on the registers under the Permanent Registration act may lawfully sign petitions to submit "local option" questions until after the last day of registration under the Permanent Registration act. Thereafter, only those persons whose names appear on the new registers are entitled to sign "local option" petitions.

Citations:

Statutes: ISBS '35, 43: 75, 77.

Australian Ballot act, sec. 5.

Primary Election act, sec. 28.

Ill. Laws (1935-36), 4th sp. sess., p. 33 (Permanent Registration act).

Case: People v. Hoffman, 116 Ill 587 (1886).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of July 30th, 1936, in which you ask to be advised whether or not the signers of "local option" petition must be only those registered under the new registration law, we are pleased to advise you as follows:

Illinois State Bar Statutes, 1935, section 2, paragraph 75, article 9, chapter 43, "Dram Shops," reads in part as follows:

"When any *legal voters* of a precinct or 'group of precincts' in any city, village or incorporated town of more than 200,000 inhabitants, as determined by the last preceding Federal census, desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in such precinct or 'group of precincts,' they shall, at least 60 days before an election, file in the office of the clerk of such city, village or incorporated town, a petition as hereinafter provided, directed to the clerk, containing the signatures of not less than twenty-five per cent of the *voters* of such precinct or 'group of precincts,' such percentage to be computed upon the basis of the total number of votes cast for Governor in such precinct or 'group of precincts' at the general election held on November 8, 1932; and in no event shall a precinct be included in any 'group of precincts' for the purpose of group or unit voting unless at least twenty-five per cent of the said number of *voters* in such precinct shall have joined in such petition."

Illinois State Bar Statutes, 1935, section 4, paragraph 77, article 9, chapter 43, "Dram Shops," reads in part as follows:

"* * * Such petition shall consist of sheets having such form printed or written at the top thereof and shall be signed by the *legal voters* in

their own proper persons only and opposite the signature of each *legal voter* shall be written his residence address (stating the street and the house number if there be such) and the date of signing the same. In the case of a group of precincts, in a proper column and opposite the signature of each *legal voter* shall be written the designation of the precinct, as hereinbefore defined, in which such voter resides. No signature shall be valid or be counted in considering such petition unless these requirements are complied with and unless the date of signing is less than six months preceding the date of filing the same. At the bottom of each sheet of such petition shall be added a statement, signed by a resident of the county in which the signers thereof reside, with his residence address as aforesaid, stating that the signatures on that sheet of the said petition are genuine, and that to the best of his knowledge and belief the persons so signing were at the time of signing said petition *legal voters* in the said political subdivision, precinct or group of precincts, as the case may be; and their respective residences are correctly stated therein and that each signer signed the same on the date set opposite his name. Such statement shall be sworn to before some officer residing in the county where such *legal voters* reside, authorized to administer oaths therein. Such petition, so verified, or a copy thereof, duly certified as hereinafter provided, shall be prima facie evidence that the signatures, statement of residence and dates upon such petition are genuine and true and that the persons signing the same are *legal voters* of the political subdivision or precinct named."

While there is some conflict in the authorities as to the question whether the terms "legal voter," "qualified voter," or "qualified elector," as used in statutes similar to the one quoted above require the "voter" or "elector" to be registered, it has been the universal practice of officials administering such statutes to hold that the terms mean registered voters. Section 5 of the Australian Ballot law which refers to nominations by petition provides that nominations of independent candidates for public office may be made by nomination papers signed by a certain number of "qualified voters." Section 28 of the Primary law provides that nominating petitions shall be signed by a certain number of "qualified primary electors."

While our courts have never passed on the question whether "qualified voters" or "qualified primary electors" means registered voters the Board of Election Commissioners on advice of counsel has uniformly held that these terms mean registered voters.

The constitution of Illinois does not prescribe registration as one of the qualifications of a voter. It is well settled that where the qualifications of an elector are prescribed by the Constitution the legislature has no power to add other qualifications unless such power is expressly conferred by the Constitution. In discussing this matter our Supreme Court said:

"By prescribing certain qualifications for voters the constitution necessarily intended that the legislature should provide some mode of ascertaining and determining the existence of these qualifications. A registry law is merely a mode of ascertaining and determining whether or not a man possesses the necessary qualifications of a voter." (*People v. Hoffman*, 116 Ill 587.)

Since 1885 our election laws have provided for registration of voters. At a recent special session of the General Assembly a new law known as the "Permanent Registration act" was enacted. This act which became effective July 1, 1936, changed the method of registration and specifically repealed all of the section of the "City Election act" having to do with the registration of voters. As a registry law is merely a method of determining the necessary qualifications of a voter, those voters who were registered under the old statute have established their qualifications as voters and the repeal of the provisions by which they so proved their qualifications does not affect their status as legal voters for the purpose of signing petitions such as the "local option" petition set out above.

As a record of such registration is in the Board of Election Commissioners it is our opinion that persons whose names appear on the old registers as well as on the registers under the new act may lawfully sign petitions to submit "local option" questions until after the last day of registration under the new act and thereafter only those appearing on the new registers are entitled to sign such petition.

SALE OF ALCOHOLIC LIQUOR ON REGISTRATION DAYS

(No. 9267—*Commissioner of Police—M.H.F.—August 27, 1936*
—3½ pp.)

The sale at retail of alcoholic liquor on the days of registration provided for under the Permanent Registration act is not prohibited, nor is there any requirement that taverns or other retail establishments licensed to sell alcoholic liquor at retail remain closed on these dates. Intoxicating liquors are prohibited in places of registration on these days, however.

Citations:

Statutes: Liquor Control act, art. VI, sec. 10; art. IX, sec. 1.
Permanent Registration act, art. II, sec. 15; art. IIIA, sec. 4.
ISBS '35, 46: 352.

Other references: Bouvier's Law Dictionary (Rawles' 3rd rev.) vol. 1, p. 979,
"Elections"; vol. 2, p. 2858, "Registration."
53 CJ 1082.

OPINION OF FOREGOING SYNOPSIS

Your communication of August 25, 1936, requests our opinion regarding the question whether the sale of alcoholic liquor is prohibited by law on September 19 and October 6, 1936, said dates being the designated days of registration under the recently enacted Permanent Registration law of Illinois.

Section 10 of article VI of the Illinois Liquor Control law, chapter 43, Illinois State Bar Statutes, 1935, provides as follows:

"No person shall sell at retail any alcoholic liquor on the day of any national, state, county or municipal election, including primary elections, during the hours the polls are open, within the political area in which such election is being held, or on Sundays unless authorized by general ordinance or resolution of the city council, president and board of trustees or county board, as the case may be; *provided, however*, that the city council, president and board of trustees or county board, as the case may be, may further restrict the permissible hours for the sale of alcoholic liquors under such licenses in its political subdivision as the public good and convenience may require."

In defining the term "election" in article IX of the same act, section 1 thereof reads in part as follows:

"'Election' as used in reference to cities, villages and incorporated towns, shall mean an election at a time fixed by law for choosing city, village or incorporated town officers. 'Election' shall also mean an election at a time fixed by law for choosing county, township or road district officers. * * *"

The two days of registration above mentioned are days fixed by the Permanent Registration law for the registration of persons entitled to be registered, in addition to the registration authorized at the office of the Board of Election Commissioners. (Section 4, article III-A, Permanent Registration law of Illinois) They are days preceding the day set for the election to be held on the first Tuesday after the first Monday in November, 1936. Manifestly they are registration days and not election days. In our opinion neither day is a "day of any national, state, county or municipal election, including primary elections" within the plain meaning of the language used in section 10 of article VI of the State Liquor Control law above quoted. Furthermore polls are not open on such registration days as they are on election days. As defined by lexicographers the term "election" means the selection of one or more persons from a specified class to discharge certain duties in a state, corporation, or society. It carries the idea of a vote and has often been construed to mean the act of casting and receiving the ballots. (*Bouvier's Law Dictionary Unabridged*, 3d ed., vol. 1, p. 979) The term "registration" when applied to voters is used to describe the act of making a list or register of persons qualified to vote. (*Bouvier's Law Dictionary Unabridged*, 3d ed., vol. 2, p. 2858) It is the method of proof prescribed for ascertaining the electors who are qualified to cast votes. (53 *Corpus Juris*, p. 1082) Hence it follows that the word "election" cannot be held the synonym of registration.

Our examination of the Permanent Registration law of Illinois, approved June 6, 1936, in force July 1, 1936, discloses nothing which causes us to alter the conclusion reached herein. On the contrary, throughout this act there appears to be a clear distinction between days of registration and days of election. The same holds true as to our examination of the statute on elections. (Chap. 46, Illinois State Bar Statutes, 1935) It is, however, made unlawful to use any building or part of a building as a place of registry, or revision of registration, in which spirituous or intoxicating liquor

is sold. (Section 15, article II, Permanent Registration law) It is also made an offense under the elections statute to bring, take, order, or send into, or attempt to bring, take, or send into, any place of registration, or revision of registration, any distilled or spirituous liquors whatever during the hours of registration. It is also made a misdemeanor for any person at any such time and place to drink or partake of such liquor. (Par. 352, chap. 46, Illinois State Bar Statutes, 1935.)

With the exception of the provision contained in the elections statute, above referred to, which prohibits intoxicating liquors in places of registration, we find no prohibition against the sale at retail of alcoholic liquor on the days of registration provided for under the Permanent Registration law and no requirement that taverns or other retail establishments licensed to sell alcoholic liquor at retail remain closed on said dates.

SALE OF PACKAGED LIQUOR TO MINORS WITH PARENTS' PERMISSION

(No. 9508—*M.H.F.*—April 29, 1937—1½ pp.)

It is unlawful for a tavern keeper or liquor store licensee to sell or deliver to a minor a package containing alcoholic liquor despite a letter or permission in writing from the minor's parents. The letter or permission of a parent in writing would not supersede the plain public policy prohibition against sales and deliveries of liquor to minors which is contained in the State Liquor Control act.

Citation: ISBS '35, 43: 2(5), 38.

IMPOUNDING OF VEHICLES OF INTOXICATED DRIVERS

(No. 9197—*City Council*—*J.F.G.*—June 12, 1936—2 pp.)

The City Council has no power to pass an ordinance which would authorize the judges of the Municipal Court to impound vehicles of drivers found guilty of driving while intoxicated. The impounding of a motor vehicle is a forfeiture of a property right, and the City Council may not impose the penalty of forfeiture of property or property rights for a violation of any ordinance.

Citations:

Statute: ISBS '35, 24: 65(102).

Cases: *People v. Dreher*, 302 Ill 50 (1922).

Frost v. People, 193 Ill 635 (1916).

People v. Lavendowski, 329 Ill 223 (1928).

I. LABOR

PICKETING

(No. 9470—*Commissioner of Police—B.H.—March 31, 1937—10 pp.*)

The Police department should take no action to interfere with picketing which is conducted in a peaceable manner, for picketing, as the term is generally understood, is lawful in Illinois when peaceable and without coercion, intimidation, or disorder.

There must not necessarily be an immediate dispute directly between any particular employer and a particular group of employees of that employer for picketing to be lawful, if the picketing is done to further the improvement of labor conditions for employees in the industry as a whole.⁶

The so-called Anti-Injunction act represents the public policy of Illinois with regard to labor disputes, which is that workers should not be interfered with by the government authorities in the conduct of lawful strikes in a lawful manner, and that picketing may be a part of the strike methods.

Labor unions are legal under Illinois and Federal jurisprudence.

The strike is a lawful instrument in a lawful economic struggle or competition between employer and employees.

Citations:

- Statutes: Ill. Laws (1893), p. 98.
Ill. Laws (1925) p. 378.
SH '35, 48: 2a.

- Cases: United States Code, title 29, sec. 101-115.
West Coast Hotel Co. v. Parrish, 81 L Ed (U. S.) 455 (1937).
Gillespie v. People, 188 Ill 176 (1900).
Kemp v. Division 241 of Amalgamated Association of Street and Electric Railway Employees, 255 Ill 213 (1912).
Beaton v. Tarrant, 102 Ill App 124 (1902).
Franklin Union No. 4 v. People, 121 Ill App 647 (1905); 220 Ill 355 (1906).
Barnes v. Chicago Typographical Union No. 16, 232 Ill 424 (1908).
American Cigar Co. v. Berger, 221 Ill App 299 (1921).
Fenske Brothers v. Upholsterers' International Union of North America, Local No. 18, 358 Ill 239 (1934).
American Steel Foundries v. Tri-City Central Trades Council, 257 US 184 (1921).

⁶ The Illinois Appellate Court has since held similarly. See *Schuster v. International Association of Machinists*, 293 Ill App 177 (1937).

Rosen v. United Shoe and Leather Workers' Union, 267 Ill App 49 (1936).

Nann v. Reimist, 225 NY 307, 174 NE 690 (1931).

Other references: Op. Corp. Coun. (1915-16), pp. 774, 975.

Pope's Encyclical, March 18, 1937.

OPINION OF FOREGOING SYNOPSIS

The Department of Law is in receipt of your communication of March 29th in which you state:

"I am forwarding you herewith a copy of a letter from Mr. C—— F——, attorney, * * * relative to a strike against the Bowling Proprietors Association of Greater Chicago called by members of the Ten Pin Setters Federal Labor Union. Mr. F—— requests that picketing by the strikers be prohibited. Kindly render me an opinion in the matter." The letter of Mr. F—— sets forth:

1. That there has been formed, under the auspices of the American Federation of Labor, a new union of ten pin setters;
2. That negotiations have been in progress for settlement of demands for increased wages by the members of the union;
3. That a strike was called by the pin setters, despite the fact that a Federal conciliator and an organizer representing the American Federation of Labor urged that the pin boys accept a settlement tendered by the employers; and
4. That the strike was called despite the fact that the employers had no objection to the organization of a union.

(The) letter contains the statement: "There is no controversy between the pin boys who are working and the employers." (It) further states that the employers of bowling alleys whose pin setters have not gone on strike "don't like the pickets parading before their places of employment, because it causes people who know them to believe they are acting as strikebreakers." Mr. F—— further comments:

"As I understand the law pertaining to picketing, and the decisions of the courts construing the law, no picketing will be countenanced or permitted unless there is a bona fide, legitimate controversy between the employees of a business and the employer."

Present economic conditions, and the recent wave of industrial disputes manifested by strikes appear to make it worth while for the Department of Law to go somewhat thoroughly into the question raised by your request for this opinion. This is in an effort to clarify certain matters relating to the labor question that are inherent in this particular case. This seems all the more desirable since a study of the published opinions of the Corporation Counsel and Assistants of Chicago reveals that not since 1916 has there been any thorough discussion of the subject of picketing by this department (9 Op. Corp. Coun. 774 and 975). In the twenty-one years that have passed, both the laws of Illinois and the attitude of the courts have undergone considerable change with regard to the gen-

eral labor question. This is true of most of the other states in the Union, and also true of the attitude of the United States Supreme Court and the lesser Federal courts.

It might be helpful to recognize that historically there has been a constant change in this particular field of law—although, to be sure, there has not been any change with regard to the vital necessity that law and order be maintained and preserved for the welfare of the general public regardless of the rights of any particular private parties in any controversy. The rights of the public, of course, are paramount in law and reason. However, it also is plain that labor, through the years, has won increasing recognition of increasingly greater rights. The old theory that labor is a commodity, and may be treated as such, has definitely been rejected in enlightened quarters, and perhaps no one in this age would wish to go back to the old order in that respect.

Moreover, it is now an accepted principle of jurisprudence in this country that economic and social facts may be considered, in addition to abstract legal principles, in determining matters of this kind. Emphasis toward this view was given by the United States Supreme Court in the very recent decision in the *West Coast Hotel Company of Seattle* case [81 L Ed (U.S.) 455 (1937)] involving minimum wage laws for women, as for example, this language:

"It is unnecessary to cite official statistics to establish what is common knowledge through the length and breadth of the land. While in the instant case no factual brief was presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers." In other words, the law recognizes social and economic realities.

In line with this approach, we may also take cognizance of views on social matters from accepted sources, as for example, the recent Encyclical of the Vatican (March 18, 1937) in which it was said: "The wage earner is not to receive as alms what is his due in justice" and that there should be recognized "the inalienable right of the working man to a salary sufficient for himself and his family." It is proper to consider testimony such as this.

At one time in Anglo-Saxon jurisprudence, labor unions themselves were deemed unlawful and a strike was held criminal *per se*. This was true in England until the repeal of the Combination acts in 1824 and 1825. It was not until 1842 that an American state, Massachusetts, clearly held that workmen could voluntarily quit their employment in a body. Illinois has probably followed, generally speaking, although with certain noteworthy exceptions, the trend in other states of the Union. However, it was not until 1893 that the Illinois General Assembly, which establishes the public policy of the State, passed a bill (Laws of 1893, p. 98) definitely guaranteeing the right of employes to belong to a labor organization. This act declared it unlawful to prevent workers from joining a union. While the Illinois Supreme Court declared this act unconstitutional [*Gillespie v. People*, 188 Ill 176 (1900)], the court decided the issue on other grounds than the legality of labor unions themselves. As will be seen from other decisions, it has been accepted that labor unions are legal in Illinois.

Some laws have been passed in Illinois, notably the so-called LaSalle-Black law of 1863, which prohibited strikes under certain circumstances, but in 1912, the Illinois Supreme Court rendered a decision which is particularly clear language recognized the strike as a legitimate activity. This was the case of *Kemp v. Division 241 of the Amalgamated Association of Street and Electric Railway Employees* [255 Ill 213 (1912)]. Some of the language of the court in that case was:

"Labor unions have long since been recognized by the courts of this country as a legitimate part of the industrial system of this nation. The ultimate purpose of such organization is, through combination to advance the interests of the members by obtaining for them adequate compensation for their labor, and it has been frequently decided by the American courts that the fact that this purpose is sought to be obtained through combination or concerted action of employees does not render the means unlawful."

In this same case, Mr. Justice Cooke said:

"If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the members of a labor union of the utmost importance and necessary for the preservation of their organization, through which, alone, they have been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the successful prosecution of the object of the combination injury may result incidentally to non-union men through the loss of their positions, that object does not become unlawful. . . . It was only incumbent upon them to act in a peaceful and lawful manner in carrying out their plans." (*Ibid.*, pp. 226, 227.)

With regard to the specific question of picketing, the position of the Illinois courts, viewed historically again, has been somewhat checkered. In 1902, the Appellate Court, in the case of *Beaton v. Tarrant* (102 Ill App 124) ruled that picketing was lawful, if peaceable. The court said:

"Workmen may use the streets and highways in a manner not inconsistent with public travel for the purpose of entreaty, inducement, and peaceable persuasion in good faith, and a patrol or picket may not necessarily imply force or a threat of bodily harm."

However, in 1905, the Appellate Court in the case of *Franklin Union No. 4 v. People* (121 Ill App 647) held that there could be no such thing as peaceful picketing. The court stated:

"It is idle to talk of picketing for lawful persuasion purposes. Men do not form picket lines for the purpose of conversation and lawful persuasion. . . . Its use is a form of unlawful coercion."

This view was sustained by the Illinois Supreme Court in the same case [220 Ill 355 (1906)], but with a dissenting opinion. In 1908, the Illinois Supreme Court again held that a peaceful picket line was unlawful, also with a dissenting opinion (*Barnes v. Chicago Typographical Union No. 16*,

232 Ill 424). As recently as 1921, an Appellate Court decision asserted flatly that in Illinois there is no such thing as peaceful picketing, that the very act of picketing means intimidation and was unlawful (*American Cigar Co v. Berger*, 221 Ill App 299).

This was the law in this State, despite vigorous protests by organized labor and the general trend elsewhere, until 1925, when the state of Illinois adopted the so-called Anti-Injunction act (Ill. Laws, 1925, p. 378, and Smith-Hurd, ch. 48, sec. 2a, 1935). The language of this statute reads as follows:

"2a. *Issuance of injunctions prohibited.*) No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimation recommending, advising, or persuading others so to do; or from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

This statute represents the public policy of Illinois, which is that workers should not be interfered with by the authorities in the conduct of lawful strikes lawfully conducted, with recognition that picketing may be a part of the strike methods.

There existed responsible basis for controversy over the validity of this statute for nearly nine years, until, in the case of *Fenske Brothers v. Upholsterers' International Union of North America, Local No. 18* [385 Ill 239 (1934)], the court definitely held the act constitutional and refused to enjoin peaceable picketing. In that case the court quoted at length from the United States Supreme Court decision in the *American Steel Foundries v. Tri-City Central Trades Council* [257 US 184 (1921)] and concluded that the law in the majority of states in the country is that peaceable persuasion and peaceable picketing, not amounting to coercion, are lawful (*Ibid.*, p. 256). This is now indisputably the law in Illinois, although it should be observed that some lower courts have exercised considerable discretion in determining the question of when picketing is or is not peaceable. However, in the latest case on this subject, the Appellate Court of the First District, in an opinion written by Mr. Justice Matchett, followed the ruling of the Fenske case with complete agreement with the spirit of that case. [*Rosen v. United Shoe and Leather Workers' Union*, 287 Ill App 49 (1936)]. It may be noted in passing that since the passage of the Illinois Anti-Injunction act, Congress, in 1932, adopted a similar act known as the Norris-La Guardia Anti-Injunction act (USCA, title 29, secs. 101-15).

From the foregoing, the following definite propositions may be set forth:

1. Labor unions are legal under Illinois and Federal jurisprudence.
2. The strike is a lawful instrument in a lawful economic struggle or competition between employer and employees.
3. Picketing, as the term is generally understood, is lawful in Illinois when peaceable and without the elements of coercion, or intimidation, or disorder.

With regard to the point raised by Mr. F—— that “no picketing will be countenanced or permitted unless there is a bona fide, legitimate controversy between the employees of the business and the employer,” even if this were the law, the point appears not to be pertinent in this case on the facts as presented by Mr. F—— in his letter. There obviously has been a dispute in the industry, if not with all of the firms involved

There appears to be no pertinent Illinois law on this particular point, although the weight of opinion in other jurisdictions seems to indicate that no immediate dispute is necessary for picketing to be lawful if it is done in furtherance of improved labor conditions for employees in the industry. In a New York case involving picketing of shops in which there was no strike, in which the decision was written by a justice who is now a member of the United States Supreme Court, this language is found:

“The legality of defendant’s conduct is not affected by the fact that no strike is in progress in any of the plaintiff’s shops. If the defendant believes in good faith that the policy pursued by the plaintiff and by the shops united with the plaintiff is hostile to the interests of organized labor, and is likely, if not suppressed, to lower the standards of living for workers in the trade, it has the privilege by the pressure of notoriety and persuasion to bring its own policy to triumph.” [*Nann v. Raimist*, 225 NY 307, 174 NE 690 (1931).]

The late Chief Justice William Howard Taft took a similar position in the case of *American Steel Foundries v. Tri-City Central Trades Council* [257 US 184 (1921)]:

“Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their mem-

bership, and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious."

Our opinion, therefore, is, in the case presented to us, that the Police department of the city of Chicago take no action to interfere with picketing when such picketing is conducted in a peaceable manner. If Mr. F— believes relief is necessary, the action indicated is an appeal to the courts rather than to the Police department, except if there is disorder or clear probability of disorder, in which case, of course, the police must intervene.

HOUSING EMPLOYEES IN STEEL PLANT

(No. 9532—Mayor—B.H.—June 4, 1937—7 pp.)

As the reports of the Board of Health and the Department of Buildings show that a steel corporation, in housing employees in its steel plants, is violating provisions of the Revised Chicago Code of 1931 which concern ventilation, which prohibit the use of a building for a purpose other than that to which it is adapted by structure and equipment, and which prohibit the change of a building from one use to another without a permit from the Commissioner of Buildings, the administrative officers of the City have no alternative except to order that the use by the steel corporation of its buildings to house employees in violation of the City's ordinances be discontinued within a reasonable time, which the Department of Law believes to be forty-eight hours.

Citations:

Ordinances: Code '31: 1204, 1223, 1226, 1497-1499.

Case: Hartman v. Chicago, 282 Ill 511 (1916).

Other references: Op. Corp. Coun. (1897-1905), p. 947.
Opinion No. 9470 (this volume, p. 110).

OPINION OF FOREGOING SYNOPSIS

In accordance with your request I have considered the facts disclosed in the communication dated June 4, 1937, addressed to you by the Board of Health and by the Department of Buildings of the city of Chicago in reference to the situation obtaining in buildings of the Republic Steel Corpora-

tion due to the housing of employees in those buildings during their present labor controversy.

The Board of Health points out that the requirements of section 1223 of the Revised Chicago Code of 1931, as amended, with respect to the ventilation of buildings are not being complied with. The report of the Department of Buildings shows that the provisions of section 1498 of the Revised Chicago Code of 1931, as amended, making it unlawful to use a building for a purpose other than that to which it is adapted under the ordinance by structure and equipment, as well as the provisions of section 1499 concerning the steps to be taken in connection with a change in the use or occupation of a building, have been disregarded.

The Revised Chicago Code of 1931 has these provisions:

"1497. *Construction or alteration of building requirements.*) Every building or structure or part thereof, hereafter constructed, erected, altered, enlarged, repaired or changed within the city shall be so constructed, erected, altered, enlarged, repaired or changed in accordance with the provisions of this ordinance.

"1498. *Class of buildings not to be changed without conforming to provisions of part IV of this ordinance.*) If buildings, the uses of which bring them within any of the classes mentioned in part IV of this ordinance, are to be applied to the uses of any other class for which a better system of construction is required by the provisions of this ordinance, the construction and equipment of such buildings shall first be made to conform to the requirements of this ordinance as specified for their intended use. And it shall be unlawful to use any such building for a new or different purpose from that to which its structure and equipment adapts it under this ordinance, unless a permit for such alteration or use shall have been first obtained from the commissioner of buildings and the requirements of this ordinance for such new or different use shall have been complied with.

"1499. *Alteration of existing buildings.*)

* * * * *

(c) If, however, it is desired to enlarge, or in any manner materially modify the construction of any existing building, or to make a change in its use or occupation which will transfer it from one class, as recognized by part IV of this ordinance, to another class, then, before such enlargement or structural change or modification of building is made, or before such change in its use or occupation may be made, written notice shall be given to the commissioner of buildings of the intention to change the character of the use, and the entire building shall be reconstructed or modified in such manner as to bring the same, when enlarged or altered, or when occupied for its new and different purposes, into compliance with the provisions of this ordinance."

The language of these sections is clear and not subject to misinterpretation, particularly the statement in section 1498: "*it shall be unlawful to use any such building for a new or different purpose from that to which its structure and equipment adapts it under this ordinance, unless a permit for such alteration or use shall have been first obtained from the commissioner of buildings and the requirements of this ordinance for such new or different use shall have been complied with.*"

It will be observed that it is essential that before any building is used for a new or different purpose, a permit for such alteration or use shall have been first obtained from the Commissioner of Buildings and that the requirements of the building ordinance for such new or different use shall have been complied with. The department reports presented to me by you indicate clearly that this procedure has not been followed; that at no time was a permit for the new use, that is, the housing of human beings in the corporation's plant, requested from the Commissioner of Buildings.

The buildings of the plant of the Republic Steel Corporation were constructed to be utilized for the corporation's business, which is the manufacture of steel and steel products. Under the building ordinance such use is defined as class I (Section 1204, Revised Chicago Code, 1931). Buildings used for hotel, club, lodging or rooming house purposes, where such buildings have sleeping accommodations for twenty or more persons, fall within a different class, class II B (Section 1226 of the Revised Chicago Code).

It is further pertinent to observe that paragraph (c) of section 1499, heretofore quoted, states specifically that if it is desired in any manner to make a change in the use or occupation of a building which will transfer it from one class to another class, it is necessary before such change is made in its use or occupation, that written notice be given to the Commissioner of Buildings of that intention, and that the entire building be so reconstructed or modified that it is in compliance with the requirements of the ordinance concerning the new use. The required notice has not been given nor have the necessary alterations been made, according to the reports presented to me.

It is apparent therefore, that the present use of these buildings by the Republic Steel Corporation for the housing of employees is a violation of the ordinances of the City. It is clearly within the power of the City to regulate the construction and the use of buildings for the protection of the lives and safety of its citizens. [*Hartman v. City of Chicago*, 282 Ill 511, (1916)]

The problem presented here is not a novel one. An identical question was raised during the stock yards strike of 1904. It appeared that employees of the stock yards were being housed overnight in the packing plants because of picketing of the plants by workers on strike, and that the ordinances of the City relating to the occupancy and use of buildings

which prohibited changes in the use of buildings except upon compliance with certain named conditions, were being violated.

An opinion upon the question then presented was rendered on August 19, 1904, by the then Corporation Counsel, the Honorable Edgar B. Tolman, formerly President of the Illinois and Chicago Bar Associations, and presently editor of the American Bar Association Journal. (*Opinions of the Corporation Counsel and Assistants, 1897-1905, p. 947.*)

In that opinion, we find this language:

"It may be suggested that it is necessary to take into consideration existing conditions at the Stock Yards; that an industrial war is being waged between the packers and their former employes; that numerous instances have occurred in which acts of violence have been committed against the men and women who have been recently employed by the packers to take the places of the men and women who have left the packing houses on a strike; that these new employes are housed in the packing houses to secure their personal safety.

"The considerations would be of controlling importance in the absence of express legislation prohibiting the use of such buildings for lodging house purposes. In the presence of express provisions of the law to the contrary, however, it is no more justifiable to permit the packers to break the law for the purpose of providing for the safety of their present employes, than it is to permit their former employes to break the law in their efforts to prevent the employment of men and women in the places formerly occupied by them. If either party to this industrial conflict cannot win without breaking the law, that party deserves to lose. The administrative officers of the municipal government can, in such a case, do nothing more and nothing less than to enforce the law against both contending parties, and let the results be what they may." (p. 952.)

The language just quoted is pertinent to the present situation. While we do not here go into the general questions involved in a labor dispute, it may be mentioned that this department expressed itself on the subject of picketing in labor disputes in an opinion rendered to the Commissioner of Police on March 31, 1937. In that opinion we stated three propositions: First, the existence of labor unions is legal under Illinois and Federal law; Second, the strike is a lawful instrument in a lawful economic struggle or competition between employer and employees; Third, picketing, as the term is generally understood, is lawful in Illinois when peaceable and without the elements of coercion, intimidation or disorder.

We are concerned, however, in this opinion solely with the questions presented by the existing violations of law. In view of the patent violations of the City's ordinances which exist, the administrative officers of the City have no alternative except to order that the use to which the buildings of the Republic Steel Corporation are presently being devoted, in violation of the ordinances, be discontinued within a reasonable time, which we believe to be 48 hours.

The conclusion of this opinion is in line, I feel, with enlightened policy governing the attitude of municipal officials with regard to labor disputes. We cannot take sides in such controversies, but will best serve the public interest, which always is the larger interest, by enforcing all laws involved impartially. Especially is this true in a time when certain groups are challenging the ability of democratic government to cope with present day social and economic problems. The surest way to destroy democracy is to permit infractions of law and order in matters of this kind. Municipal officers must insist that both employer and employees in industrial disputes abide by the law in every instance.

CHAPTER III

LICENSING

A. SUBJECTS OF LICENSING

(1) *Liquor*

(a) *Issuance of liquor licenses*

LICENSE FOR TAVERN NEAR CHURCH

(No. 9086—*Deputy Liquor Control Commissioner—M.H.F.—March 9, 1936—1½ pp.*)

The word "church" in the Illinois Liquor Control act, which provides that "no license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church . . ." means church-owned or church-controlled property regularly used for divine worship, and does not include vacant land owned or controlled by the church organization which is not regularly used for divine worship. Therefore, a liquor license may be issued for premises located more than 100 feet from the church building though less than 100 feet from the lot line of the church property.

Citation: Ill. Liquor Control act, art. VI, sec. 8.

LIQUOR LICENSE FOR TAVERN NEAR NUNNERY

(No. 9380—*City Collector—M.H.F.—December 26, 1936—2 pp.*)

A nunnery is not included within those classes of institutions specified in the Illinois Liquor Control act, which prohibits the issuance of a retail liquor license for premises within one hundred

feet of any church, school, hospital, home for aged or indigent persons or their wives or children, or any military or naval station.

Citations:

Statute: Ill. Liquor Control act, art. VI, sec. 8.

Cases: First Congregational Church v. Board of Review, 254 Ill 220 (1912).

People ex rel. Thompson v. First Congregational Church, 232 Ill 158 (1908).

Muldoon v. Board of Review, 254 Ill 336 (1912).

People ex rel. Carson v. Muldoon, 306 Ill 234 (1923).

LICENSE FOR PREMISES NEAR PAROCHIAL SCHOOL

(No. 9165—*Liquor Control Commissioner—M.H.F.—May 18, 1936—31½ pp.*)

A lot owned by a parochial school which is not used exclusively as a playground for the school, cannot be considered a part of the school so as to bring it within the liquor law which provides that a retail liquor dealer's license shall not be issued for any place within one hundred feet of a school. However, when this vacant lot is utilized exclusively for school or church purposes, it will be within this protection of the liquor law.

Citation: Illinois Liquor Control law, art. VI, sec. 8.

GRANTING RETAIL LIQUOR LICENSE TO PARDONED PERSON

(No. 9595—*Deputy Liquor Control Commissioner—M.H.F.—August 18, 1937—21½ pp.*)

The local Liquor Control Commissioner may grant a retail liquor dealer's license to a person who, although convicted of a felony, has been pardoned, provided the person's application is otherwise regular. A pardon in legal effect blots out the offense, releasing the recipient from all the disabilities imposed by his conviction for the offense, and restoring him to all his civil rights.

Citations:

Statute: Ill. Liquor Control act, art. VI, sec. 2(4).

Cases: *Knote v. United States*, 95 US 149 (1877).

People ex rel. Richardson v. Sackett, 17 Misc (NY) 405 (1896).

People ex rel. Stine v. Chicago, 222 Ill App 100 (1921).

OPINION OF FOREGOING SYNOPSIS

Orally you have requested our opinion concerning the propriety of the local Liquor Control Commissioner's granting a retail liquor dealer's license to an applicant who was convicted of manslaughter seventeen years ago and shortly thereafter pardoned by the Governor of Illinois.

It is said that the applicant was never convicted of any offense prior to the manslaughter conviction and has not been convicted since; that he served nine months overseas with the American Expeditionary Forces and is the holder of an honorable discharge from the United States army; and that at all times since the receipt of the aforementioned pardon he has conducted himself as a respectable, law-abiding citizen.

Section 2 (4) of article VI of the Illinois Liquor Control law provides that no license of any kind issued by the State Department of Finance nor any local commission shall be issued to "a person who has been convicted of a felony under the laws of the State of Illinois."

The crime of manslaughter is a felony in Illinois. The manslaughter conviction, coupled with the above mentioned provision of the Liquor Control law, would bar applicant from receiving a city of Chicago retail liquor dealer's license, were it not for the fact that the pardon given the applicant in legal effect released him from all the disabilities imposed by the offense and the conviction and restored him to all his civil rights.

In considering the effect of a full pardon upon the condition and rights of its recipient, the Supreme Court of the United States said, in *Knote v. United States*, 95 US 149 (p. 153):

"A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position."

The above language was quoted and the holding adopted by the Appellate Court of Illinois for the First District in the case of *People ex rel. Stine v. City of Chicago*, 222 Ill App 100, whereby the court restored a police officer of the city of Chicago to his rights under the Pension law after he had been convicted of a felony.

In *People ex rel. Richardson v. Sackett*, 17 Misc (N.Y.) 405, the Supreme Court of New York held that a person who was convicted of a felony but

had received a pardon was not a convict under the ban of the law and should not be refused a liquor license for that reason.

Basing our conclusion upon the above authorities which hold that a pardon in legal effect blots out the offense, our opinion is that if the application in question is otherwise regular it would not be improper for the local Liquor Control Commissioner to grant a retail liquor license to the applicant.

LICENSE FOR LIQUOR SOLD IN ADJACENT PLACES ON SAME FLOOR

(No. 9590—*Superintendent, Bureau of License—M.H.F.—August 10, 1937—1½ pp.*)

Where alcoholic liquor is sold in packages at counters along one wall in a department store, and beer is dispensed in glasses at a counter on the same floor and in the same room along a wall at right angles to the first wall, the store floor is one location, place, or premise within the meaning of the City's ordinance, and a single retail dealer's license will suffice.

Citation: Code '31: 3143-K.

LIQUOR DEALER'S LICENSE TO VIOLATOR OF NATIONAL PROHIBITION ACT

(No. 9201—*Deputy Liquor Control Commissioner—M.H.F.—June 16, 1936—1½ pp.*)

A conviction of a violation of the National Prohibition act does not come within the provision of the State Liquor Control act which prohibits the issuance of a retail liquor license to a person who has been convicted of violating a Federal or State law concerning the manufacture, possession, or sale of alcoholic liquor after the passage of the State Liquor Control act.

Citation: State Liquor Control act, art. VI, sec. 2.

COURT ANNULMENT OF LIQUOR LICENSE REVOCATION

(No. 9190—*Deputy Liquor Control Commissioner—M.H.F.—June 3, 1936—1½ pp.*)

When a court annuls the order of the Liquor Control Commissioner revoking a retail liquor license for certain premises, the prohibition that no new retail liquor license shall be issued for premises within a year from a license revocation does not apply, and a license may be issued to a new applicant within six months of the original order.

Citation: Illinois Liquor Control act, art. VII, sec. 10.

DENIAL OF LIQUOR LICENSE

(No. 9266—*Deputy Liquor Control Commission—M.H.F.—August 26, 1936—2 pp.*)

The Liquor Control Commissioner may properly regard a yacht club as not possessing the qualifications required for a City retail liquor dealers' license when this club has been convicted of a violation of the City liquor control ordinance, has evaded compliance with the ordinance, has failed to pay the prescribed license fees for license periods during which it sold alcoholic liquor, and has failed to pay or adjust the back license fees due the City.

A clear view to the interior of a club's premises is not required under the State Liquor Control law.

Citation: State Liquor Control law, art. VI, sec. 20.

(b) *Revocation of liquor licenses*

RECOMMENDATION OF REVOCATION OF RETAIL LIQUOR LICENSE

(No. 9434—*Commissioner of Police—M.H.F.—February 19, 1937—1½ pp.*)

The Commissioner of Police would be warranted in concurring in a recommendation that a person's retail liquor license be

revoked if that person, while in an intoxicated condition, ejected an old man from the licensed premises and committed assault and battery for which he was convicted in a court. A retail liquor dealer is required to be a person of good character and reputation and to abide by all the laws of the State in the conduct of his business.

REVOCATION OF RETAIL LIQUOR LICENSE

(No. 9310—Commissioner of Police—M.H.F.—October 14, 1936 2½ pp.)

When a retail liquor licensee gave alcoholic liquor to a minor in his tavern, and was convicted in a court of contributing to her delinquency, the Commissioner of Police is warranted in recommending that the licensee's retail liquor license be revoked.

Citation: Liquor Control act, art. VI, sec. 12.

LIQUOR LICENSEE UNDER FELONY INDICTMENT

(No. 9488—Commissioner of Police—M.H.F. and A.C.—April 13, 1937—1 p.)

A person who has been indicted by the Cook County grand jury on the charge of receiving stolen property valued in excess of fifteen dollars is not a proper person to have a retail liquor dealer's license, and the Commissioner of Police would be warranted in recommending that the Liquor Control Commissioner revoke his license. Under the State criminal code, receiving stolen property valued at more than fifteen dollars is a felony.

REVOCATION OF LICENSES OF DISORDERLY RETAIL FOOD, CIGARETTE, AND LIQUOR ESTABLISHMENT

(No. 9292—Commissioner of Police—M.H.F.—September 21, 1936—6 pp.)

The conducting of a retail food, cigarette, and liquor business in such a manner as to create a public nuisance, shown by

conviction and fine in the Municipal court for so doing, is sufficient grounds for revoking the liquor, food dispenser's, and cigarette licenses issued for the premises.

The sale of alcoholic liquor during any hour in which such sale is prohibited by ordinance or the sale of liquor to motorists on the public highway in front of the licensed premises are sufficient grounds upon which to recommend the revocation of a City retail liquor dealer's license.

Citations:

Statute: Liquor Control act, art. II, sec. I; art. V, sec. I (d); art. VII, sec. II; art. X, sec. 7.

Ordinance: Code '31: 2384, 3143-Q.

Other reference: Joyce, Law of Nuisances, sec. 400.

OPINION OF FOREGOING SYNOPSIS

Your communication of September 16, 1936, transmits the following documents:

- (1) Petition of S—— C——, H—— S—— and H—— L——, owners of buildings located at * * * and some eighty-three individuals who sign as tenants of the above mentioned buildings. The petition requests the revocation of licenses issued to M—— W—— for premises located at * * * and the abatement of a common nuisance at said location alleged to be maintained by said W——.
- (2) Report of the commanding officer, 38th police district, recommending the revocation of the retail liquor dealer's license, retail food dispenser's license and cigarette license issued for said premises.

You request our opinion as to whether the statements made in the documents furnish sufficient grounds upon which you may base a recommendation for the revocation of these licenses.

From the statements contained in the petition and the police report it appears that M—— W—— operates a barbecue stand at * * * * which he calls the Pickinny barbecue stand; that he is the holder of a retail food dispenser's license, also a City retail liquor dealer's license for said premises. It also appears that a cigarette license for said premises has been issued to one G—— W——; that M—— W—— keeps his barbecue business open until 4:00 or 5:00 A. M. every morning; that he maintains what is known as a "curb service," that is, automobiles pull up to the stand, blow their horns to attract the attention of the waiters who come out to take their orders and when the patrons in the autos wish the waiters to come for their trays and glasses they blow their horns again. On an average of about one hundred automobiles visit the stand nightly and it is claimed the constant blowing of the horns is a source of great annoyance and discomfort to the tenants of adjoining apartment buildings. It further appears that M—— W—— also serves customers at tables located in front

of the barbecue stand; that the clatter of dishes and the talking, shouting and boisterousness of the patrons to 4:00 and 5:00 o'clock in the morning, and the maintenance of said "curb service" causes great annoyance to the occupants of adjoining premises and that these noises have prevented such occupants from getting their regular sleep at night, thereby affecting their health and peace of mind.

It also appears that after the efforts of the Police department failed to eliminate the conditions complained of such as the banging of dishes, hollering of employees, and the tooting of automobile horns by intoxicated patrons demanding immediate service in the early hours of the morning, M—— W—— was arrested on a warrant obtained by the owner of a twenty-four flat building located immediately across the street from the licensed premises for maintaining a nuisance; that said M—— W—— was arrested on said warrant August 24, 1936; that after the arraignment of said M—— W—— and after he had procured a change of venue the case was reassigned and tried before one of the judges of the Municipal Court of Chicago and a jury; that the defendant was found guilty of the charge on September 9, 1936, and fined \$25.00.

It is not clear to us whether the signers of the petition intend to charge M—— W—— with selling alcoholic liquor until 4:00 or 5:00 o'clock each morning. If the facts are that he has sold alcoholic liquor during any hour of the day or night in which the sale of alcoholic liquor is prohibited by the City's ordinance this in itself is a sufficient ground upon which to base a recommendation that his liquor license be revoked.

If M—— W—— has not violated the prohibited hours of sale provision of the ordinance but is conducting his retail food establishment and retail liquor business in such a manner as to constitute a common nuisance, then your recommendation should be based upon the fact that M—— W—— has been convicted of maintaining a nuisance.

The documents do not tell us what section of the municipal code M—— W—— was charged with violating. The Division of Prosecution, however, informs us it was section 2384 of the Revised Chicago Code of 1931. This section reads in part as follows:

"Matters and things detrimental to health.) No building, vehicle, structure, receptacle, yard, lot, premises or part thereof used or to be used for any purpose whatever, shall be made, used, kept, maintained or operated in the city, if the use, keeping, maintaining or operating of such building, vehicle, structure, receptacle, yard, lot or premises shall be the occasion of any nuisance, or dangerous or detrimental to health."

The courts have held that a public and disorderly liquor dispensing establishment in a City in and about which dissolute persons are admitted for lucre to remain at night and in the daytime, drinking, tippling, carousing, hallooing, etc., to the damage and disturbance of the neighborhood, is a public nuisance by common law and the keeper of it is indictable. (Joyce, *Law of Nuisances*, section 400 and cases cited therein.)

A City retail liquor dealer's license does not authorize the licensee to conduct his business on the public thoroughfare but only within the licensed

premises. By the State Liquor Control law the sale of alcoholic liquor except under and pursuant to a license is made unlawful. (Section 1, article II, Illinois Liquor Control law). A retailer's license allows the licensee to sell and offer for sale at retail in the premises specified in such license but not elsewhere. (Section 1 (d), article V, Illinois Liquor Control law). A license applies only to the premises described in the license. (Section 11, article VII, *ibid.*), Section 3143-Q of the City's ordinance prohibits the sale or delivery of liquor to any person except at the location, place or premise described in the retail dealer's license. As a retail license gives the licensee authority to sell alcoholic liquor within the licensed premises and not elsewhere, the sale of liquor to motorists on the public highway in front of the premises would, in our opinion, be unlawful and constitute a violation of the State Liquor Control law and City ordinance and furnish the local Liquor Control Commissioner with ground for the revocation thereof.

It should also be noted that section 7 of article X of the State Liquor Control law provides that every lot, parcel, or tract of land, and every building, establishment, or place whatsoever, together with all furniture, fixtures, ornaments, and machinery located thereon, wherein there shall be conducted any unlawful sale of any alcoholic liquor is declared to be a public nuisance.

Though fully licensed under the City's ordinances applicable to his business M— W— is not authorized to conduct his business in such a manner as to create a public nuisance. That he has so conducted it is established by his conviction and fine in the Municipal Court. There appear therefore to be sufficient grounds for revoking each of the licenses issued for the premises. Hence, our opinion is that in the event your department cannot otherwise abate the nuisance complained of you would be justified in concurring in the recommendation of the district commander and in recommending to the Mayor that the licenses be revoked.

REVOCATION AND DENIAL OF RENEWAL OF LIQUOR LICENSE BECAUSE OF ORDINANCE VIOLATION

(No. 9206—Commissioner of Police—M.H.F.—June 23, 1936—
1½ pp.)

The Commissioner of Police would not be justified in recommending to the Liquor Control Commissioner the revocation of a retail liquor dealer's license even though the licensee used paid entertainers without having a public place of amusement license.

However, the Commissioner of Police may recommend that a retail liquor dealer's license not be renewed on the ground

that the licensee used paid entertainers without having a public place of amusement license, and that he and his employees did not cooperate fully with the police following a shooting in his tavern.

EFFECT OF VACANT LOT OWNED BY PAROCHIAL SCHOOL ON LIQUOR LICENSE REVOCATION ¹

(No. 9170—*Liquor Control Commissioner—M.H.F.—May 21, 1936—2½ pp.*)

The Liquor Control Commissioner would not be justified in revoking the liquor license of a tavern which is within one hundred feet of a vacant lot belonging to a parochial school, if the lot was not being used as a playground for the school at the time the liquor license was issued, and is not now being used as a playground.

Citation: Illinois Liquor Control law, art. VI, sec. 8.

LIQUOR LICENSE ISSUED TO NON-CITIZEN

(No. 9125—*Commissioner of Police—M.H.F.—April 16, 1936—1½ pp.*)

A retail liquor dealer's license may be revoked if it appears that the licensee is not a citizen of the United States.

Citation: Illinois Dram Shops act, art. VI, sec. 2.

(2) Public Garages

PUBLIC GARAGE LICENSE WHEN OWNERSHIP OF GARAGE AND VEHICLES IS THE SAME

(No. 9545—*Secretary to the Mayor—M.H.F.—June 16, 1937—2 pp.*)

If the applicants for a garage license fee refund use their garage solely as a private garage for the housing of their own

¹See also Opinion No. 9165, p. 122.

vehicles which they employ to transport their own merchandise, they are not subject to a public garage license, and it would be proper to refund the fee paid to the City in error.

If the applicants maintain a garage in which motor vehicles are housed, the vehicles being used to transport passengers or to convey goods, merchandise, or materials belonging to others, they are subject to a public garage license, even though the vehicles are their own property.

Citations:

Ordinance: Code '31: 3232.

Case: *Crerar Clinch Coal Co. v. Chicago*, 341 Ill 471 (1931).

OPINION OF FOREGOING SYNOPSIS

Returned herewith is your file *re* refund F— L— of \$25.00, paid for a public garage Class I license for premises at * * * *.

The City's private garage license ordinance was declared invalid by the Supreme Court of Illinois in the case of *Crerar Clinch Coal Co. v. City of Chicago*, 341 Ill 471. The court held that the City possessed power only to license the business of public garages.

If the claimants are not engaged in the public garage business and their garage located at * * * is solely a private garage for the housing of their own vehicles used for the transportation of their own merchandise, in our opinion they are not subject to a public garage license and it would be proper to refund the fee paid the City in error.

Section 3232 of the Code provides that public garages shall include the following:

"1. Premises where two or more automobiles are stored or housed for hire, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping or maintaining of such automobiles.

"2. Premises where two or more automobiles are kept for the purpose of letting for hire or reward, with or without a driver, to be used for the transportation of passengers, goods, merchandise, materials, salvage, waste or rubbish."

If claimants maintain a garage in which motor vehicles are housed, which vehicles are used for the transportation of passengers or for the conveyance of goods, merchandise or materials belonging to others, they would in our opinion be subject to a public garage license under paragraph 2 of section 3232 above quoted, even though the vehicles were their own property.

* * * * *

CLASSIFICATION OF PARTIALLY INCLOSED GARAGE

(No. 9453—*City Collector—M.H.F.—March 12, 1937—1½ pp.*)

A garage whose first floor is completely inclosed on all sides but whose roof is not inclosed and is used for the active storage of automobiles, access being had to that roof or second floor by means of a ramp from the first floor, is an open-air⁸ or Class II garage within the meaning of the garage license ordinance.

Citation: Code '31: 3236.

CLASS II GARAGE LICENSE FOR CERTAIN PREMISES

(No. 9542—*City Collector—M.H.F.—June 10, 1937—2 pp.*)

In the case of premises operated as a garage which are under the control and operation of one applicant, one license, a class II license, should be granted, and not two licenses, a class I license for the lower level which is below the ground and entirely closed, and a class II license for the upper level which is entirely open.

Citations:

Ordinance: Code '31: 3236, 3238.

Other reference: Opinion No. 9453 (above).

(3) Undertakers**REGULATION OF FUNERAL DIRECTORS AND EMBALMERS**

(No. 9253—*President, Board of Health—M.D.S.—August 4, 1936—2 pp.*)

A person having a State funeral director's license must also have a City undertaker's license if he engages in that business within the City.

⁸The Illinois Supreme Court ruled in *Chicago v. Alpert*, 368 Ill 282, 13 NE (2d) 987 (1938), that the City's power to license garages is not limited to garage buildings but extends to open-air garages and parking lots. The court upheld the City's open-air garage licensing ordinance in *Stearns v. Chicago*, 368 Ill 112, 13 NE (2d) 63 (1938).

The sections of the Revised Chicago Code of 1931 pertaining to funeral directors and embalmers do not conflict with the State law regulating such persons.

Citations:

Statute: Act regulating funeral directors and embalmers (1935), art. I, sec. 9.
Ordinances: Code '31: 3794-3804.

OPINION OF FOREGOING SYNOPSIS

Your communication of July 7, 1936, together with a letter from the law firm of C—— and W—— has been received. You ask for an opinion as to whether or not there is a conflict between the State law pertaining to funeral directors and embalmers and the Revised Chicago Code of 1931.

From an examination of the State law pertaining to funeral directors and embalmers ("An Act in relation to the regulation of persons engaged in the practice of funeral directing and embalming and to repeal an act therein named," filed July 8, 1935) we find the following provision in the second paragraph of section 9 of article I thereof:

"Nothing in this act shall have the effect of limiting the power of cities and villages to tax, license and regulate funeral directors, undertakers and undertaking establishments. The requirements hereof shall be in addition to the requirements of any existing or future ordinance of any city or village so taxing, licensing or regulating funeral directors undertakers and undertaking establishments."

Sections 3794-3804 of the Revised Chicago Code of 1931 entitled "Undertakers" set forth as requirements for undertakers approximately the same qualifications as are required of funeral directors under the State law.

We find no repugnancy between the State law and the City ordinance and in our opinion there is no conflict between the two.

You also ask whether or not you have a right to require City undertakers' licenses to be taken out by persons operating as funeral directors or undertakers who are in possession of a State funeral directors' license.

It is our opinion that all persons engaged in the undertaking business in the city of Chicago should be required to obtain a City license therefor.

APPROVAL OF UNDERTAKER'S LICENSE APPLICATION

(No. 9435—President, Board of Health—M.H.F.—February 19, 1937—21½ pp.)

The President of the Board of Health may approve an application for an undertaker's license for premises which have been

used for an undertaking establishment although the previous lessee of the premises moved a month before his lease expired, and thereafter a tavern was established next door on premises that previously had been used for a paint shop, since the premises have not been abandoned for purposes of an undertaking establishment.

LOCATION OF UNDERTAKER NEAR TAVERN⁹

(No. 9346—City Collector—M.H.F.—November 25, 1936—2 pp.)

An undertaker must be licensed before he may engage in business, and it would be improper for the City Collector to issue an undertaker's license to any person for premises located within one hundred feet of any licensed liquor dealer's premises, as the distance prohibition is based on public policy and cannot be waived by the undertaker.

Citations:

Statute: Illinois Liquor Control act, art. VI, sec. 8.

Ordinance: Code '31: 3794-3804.

ADDITION TO UNDERTAKING ESTABLISHMENT NEAR TAVERN

(No. 9389—M.H.F.—January 11, 1937—2½ pp.)

An addition to an undertaking establishment which was doing business prior to the passage of the State Liquor Control law would be contrary to that law if the addition comes within one hundred feet of a tavern, measured on a straight line in a horizontal plane from the nearest part of the building line of the proposed addition to the nearest part of the building line of the tavern.

The prohibition of locating a tavern within one hundred feet of any undertaking establishment has no retroactive effect, and

⁹ In connection with this opinion, see Opinion No. 9517, p. 136.

The Illinois legislature has repealed the prohibition of a license to a tavern located within one hundred feet of an undertaking establishment or mortuary. [Ill. Laws (1937), p. 26 (Restricted Areas).]

so a tavern and undertaking establishment within one hundred feet of each other may continue operation if they were so located prior to February 1, 1934, the date the State Liquor Control law became effective.¹⁰

Citation:

Statute: State Liquor Control law, art. VI, sec. 8.

Other reference: Opinion No. 9346 (this volume, p. 134).

OPINION OF FOREGOING SYNOPSIS

We have your letter of December 17, 1936, enclosing a pencil diagram showing location of your undertaking establishment at 1227 D—— avenue and that of a tavern at 1217 D—— avenue. This diagram does not inform us accurately as to the distance between the two establishments. Your letter states that you started business at your present location January 1, 1929, and that the tavern was started on the repeal of prohibition in 1933. Both of these dates are dates prior to February 1, 1934, the effective date of the Illinois Liquor Control law. You now wish to take over the store adjoining your premises on the side of the tavern and use it to enlarge your premises by closing the street door of the store and making an opening in the wall between this store and your premises.

Section 8 of article VI of the State Liquor Control law provides in part as follows:

"No person shall hereafter engage in business as a retailer of any alcoholic liquor in any city, village or incorporated town having a population of 50,000 inhabitants, or over, within 100 feet of any undertaking establishment or 'mortuary.'"

This department has expressed the view that the above quoted provision is a public policy provision and that it applies equally to undertaking establishments as it does to taverns. If a tavern may not engage in business within the prohibited distance of an undertaking establishment, neither may an undertaking establishment locate within the prohibited distance from an existing tavern. (Opinion No. 9346, this volume, p. 134.)

If both your undertaking establishment and the tavern were located prior to the effective date of the State Liquor Control law, our opinion is that the enactment of that law would not have a retroactive effect so as to work the dislodgment of either establishment. It will be noted that the provision of the State law above quoted reads: "no person shall *hereafter* engage in business," etc.

The measurement of the distance is taken on a straight line on a horizontal plane between the nearest point of the building line of the tavern and the nearest part of the building line of the undertaking establishment. What the distance is between the entrance doorway of one establishment and the entrance doorway of the other establishment is not controlling.

¹⁰ See footnote 9, p. 134.

Inasmuch as the proposed addition to your establishment was not part of it and used in the conduct of your undertaking business prior to the effective date of the State Liquor Control law, if any part of this addition comes within the 100 foot prohibited area, our opinion is that it could not be used without violating the above quoted public policy provision of the State law.

LICENSING OF UNDERTAKING ESTABLISHMENT WITHIN 100 FEET OF LIQUOR ESTABLISHMENT

(No. 9517—*President, Board of Health—J.F.G.—May 12, 1937—5½ pp.*)

In accordance with a ruling of the State Attorney-General, if the City were not licensing undertakers, the restriction in the Illinois Liquor Control law that no retail liquor dealer's establishment shall be set up within one hundred feet of any undertaking establishment would not prohibit the setting up of an undertaking establishment within one hundred feet of a retail liquor dealer's establishment.¹¹

The City may become equitably estopped by the acts and conduct of its officers from denying a license for an undertaking establishment when those officers ruled in a manner that allowed persons to invest large sums of money and incur great financial obligations preparatory to setting up undertaking establishments within one hundred feet of retail liquor dealers' establishments and obtaining undertakers' licenses.

Citations:

Statute: Ill. Liquor Control act, art. VI, sec. 8.

Case: People ex rel. Dedds v. Thompson, 209 Ill App 570 (1918).

Other reference: Opinion No. 9346 (this volume, p. 134).

ESTOPPEL OF CITY FROM ISSUING UNDERTAKING LICENSE

(No. 9445—*President, Board of Health—M.H.F.—March 5, 1937—3 pp.*)

The city of Chicago is not estopped from refusing to issue a license for an undertaking establishment located within one hun-

¹¹ See footnote 9, p. 134.

dred feet of a retail liquor dealer's establishment because its Departments of Health and Buildings have approved the plans and specifications for the building to house the undertaking establishment and the Department of Buildings has issued a permit for the erection of the building. The approval of the plans and specifications and the issuance of the building permit does not authorize any violation of law.¹²

Citation: Illinois Liquor Control act, art. VI, sec. 8.

(4) Vehicles

POWER TO REGULATE USE OF STREETS BY MOTOR VEHICLES

(No. 9260—City Council—J.H.S. and J.F.G.—August 11, 1936—35 pp.)

The City may impose a vehicle tax or license fee for the privilege of using its streets upon vehicle owners who are residents of the City, regardless of whether these vehicles are used in transcontinental, interstate, inter-city, or intra-city business, or in the business of contract carrier or common carrier. However, no vehicle tax or license fee may be imposed for the privilege of using the streets upon vehicle owners who are not residents of the City.

The City may not impose a tax or license fee upon the privilege of carrying on a business of transporting passengers or freight in interstate commerce.

The City may impose a tax or license fee upon the privilege of carrying on the business of transporting freight or passengers within the City. It may possibly be able to extend this to a business carried on from a place within the City to a place outside the City but within the State, or from a place outside the City but within the State to a place within the City, but no license may be imposed on a public utility engaged in other than the local transportation of passengers for hire within the

¹² But see Opinion No. 9517, p. 136.

City by virtue of a certificate of convenience and necessity from the Illinois Commerce Commission.

The City may impose a tax or license fee and may otherwise regulate all public utilities engaged in the local transportation of passengers for hire, except railroads which are a part of a trunk line railroad system, and except interurban railroads whose principal business is not that of local transportation of passengers within the City.

The City may prescribe certain streets over which trucks, buses, and other vehicles may be operated, with a view to promoting safety and preserving the streets, whether the operation be transcontinental, interstate, inter-city, or intra-city, except where the Illinois Commerce Commission or the Interstate Commerce Commission has duly granted certificates of convenience and necessity over certain prescribed routes.

The City may prescribe all reasonable traffic regulations not inconsistent with the Illinois "Uniform Act Regulating Traffic on Highways" which shall govern all motor vehicles whether engaged in transcontinental, interstate, inter-city, or intra-city operation.

Citations:

- Statutes:** USCA, title 49, sec. 302(c).
 ISBS '35, 24: 65(42), 65(96), 322(1); 95a: 9, 10(1), 20, 21, 27, 27(1); 121: 276 et seq.
- Cases:** Interstate Buses Corporation v. Blodgett, 276 US 245 (1928).
 Clark v. Poor, 274 US 554 (1927).
 Morris v. Duby, 274 US 135 (1926).
 Kane v. New Jersey, 242 US 160 (1916).
 Hendrick v. Maryland, 235 US 610 (1915).
 Adams Express Co. v. New York, 232 US 14 (1913).
 City of Flora v. Borders, 342 Ill 208 (1931).
 People v. Thompson, 341 Ill 166 (1931).
 Chicago Motor Coach v. Chicago, 337 Ill 200 (1930).
 Chicago, North Shore and Milwaukee RR. v. Chicago, 331 Ill 360 (1928).
 Hearth v. Village of Downer's Grove, 278 Ill 92 (1926).
 Roe v. City of Jacksonville, 319 Ill 215 (1926).
 Chicago v. Francis, 262 Ill 331 (1914).
 Harder's Storage Co. v. Chicago, 235 Ill 58 (1908).
 Gartside v. City of East St. Louis, 43 Ill 47 (1867).
 City of Cairo v. Adams Express Co., 54 Ill App 87 (1894).
 City of East St. Louis v. Bux, 43 Ill App 276 (1892).
 Capital Taxicab v. Cermak, 60 F (2d) 608 (1932).
 Lowe v. Stoutamire, 166 So 310 (Fla., 1936).

State ex rel. R. C. Motor Lines v. Florida Railroad Commission, 166 So 840 (Fla., 1936).

Railroad Commission of Texas v. Southwest Greyhound Lines, 92 SW (2d) 296 (Texas Civil App., 1936).

Other reference: 31 American Law Reports 594.

OPINION OF FOREGOING SYNOPSIS

At the regular meeting of the City Council held March 11, 1936, the following resolution was adopted:

"Whereas, The unlimited use of Chicago streets by trucks and buses of trans-continental, inter-State, inter-City and intra-City common or contract carriers of persons and/or freight presents an additional important factor to be met in Chicago's drive for safety; and

"Whereas, Such unlimited use is destructive of streets built principally from application of vehicle tax funds, which tax is paid, mostly, by owners of private passenger vehicles; and

"Whereas, It is unfair to such owners of private passenger vehicles to permit such unlimited use of City streets to such carriers without compensation; and

"Whereas, The mushroom growth of the business above referred to will certainly result in State legislation controlling to reasonable extent the operation of said trucks and buses within the State; and

"Whereas, Such rapid growth (of business) and unlimited use (of streets) referred to, has resolved itself into conversion of public thoroughfares, within and without limits of cities, into private rights of way, upon which carriers operate huge tractor-trailers and buses carrying carloads of freight and passengers, with little or no restrictions; and

"Whereas, It behooves the City of Chicago to prevent, so far as is possible, encroachments upon its self-governing powers;

"Therefore, Be It Resolved, That the Corporation Counsel, be and he is hereby directed to inquire into this matter forthwith, and determine what jurisdiction, if any, the Mayor and/or City Council has over Chicago streets, so far as it concerns correcting the abuses set forth in the preamble hereof; and

"Be It Further Resolved, That a report of such inquiry be given the City Council as soon as possible, giving particular attention to the powers of the Mayor and City Council, to prescribe certain streets over which such trucks and buses may be operated and to levy tax for such operation."

I.

The Powers of the State and Its Agencies to Tax, License and Regulate Instrumentalities of Commerce as Affected by Federal Laws.

So far as the Federal government is concerned no obstacle is encountered by State authorities of which municipalities are an agency in regulating,

licensing, and taxing vehicles used in interstate commerce over roads or streets, constructed or controlled by the State or any of its municipalities. The Supreme Court of the United States has repeatedly sustained this power.

In the leading case of *Hendrick v. Maryland*, 235 US 610, there was involved a statute of the state of Maryland which imposed a registration fee upon persons driving motor vehicles upon the highways of the State. The registration fees were fixed according to horse power. The moneys which were collected under the provisions of the act were to be used in constructing, maintaining, and repairing streets and roads. The defendant who was a resident of the District of Columbia failed to comply with the statute and was prosecuted thereunder. Among other attacks upon the act he charged that it was invalid in that it attempted to regulate interstate commerce. The court, however, sustained the statute and its reasoning in upholding the power of the State to regulate vehicles used in interstate commerce to the extent attempted in the statute is well expressed on pages 622 and 623 of the opinion:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the over-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the State put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

In *Kane v. State of New Jersey*, 242 US 160, a similar statute was upheld. In addition to the registration feature contained in the Maryland

statute the New Jersey law provided that non-residents using the highways appoint an agent within the State upon whom process could be served. The statute was upheld in this respect.

Morris v. DUBY, 274 US 135, furnishes another illustration of the manner in which States may regulate the instrumentalities of interstate commerce. In this case there was involved a law of Oregon which prohibited the operation of trucks carrying a combined load of more than 16,500 pounds. This was declared by the Supreme Court to be a permissible regulation even though the effect thereof would be to drive the defendant out of business by reason of the fact that unless a truck with a load weighing 22,000 pounds or more could be used the operation would be profitless.

Another illustration of the manner in which vehicles engaged in interstate commerce may be taxed is found in *Clark v. Poor*, 274 US 554. That case involved the Ohio Motor Transportation act of 1923 which provided that a motor transportation company desiring to operate within the State shall apply to the Public Utilities Commission for a certificate so to do and shall not begin to operate without first obtaining it, and also that such company must pay at the time of the issuance of the certificate and annually thereafter a tax graduated according to the number and capacity of the vehicles used.

The plaintiffs contended that as applied to them the act violated the commerce clause of the Federal Constitution since they were engaged exclusively in interstate commerce and were consequently not subject to regulations by the State; that the State was without power to require that before using its highways they apply for and obtain a certificate, and that it was also without power to impose in addition to the annual license fee demanded of all persons using automobiles on the highways a tax upon them for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. In holding that the contentions of the plaintiff were untenable the court (on page 557) said:

"The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. (Citing cases) Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire who make the highways their place of business may properly be charged an extra tax for such use."

Another method employed by states to obtain revenue for the use of their highways by vehicles engaged in interstate commerce is to impose a mileage tax. In *Interstate Busses Corporation v. Blodgett*, 276 US 245, there was involved a statute of Connecticut requiring the registration of motor vehicles. The act also imposed a tax of one cent for each mile of highway traversed by any motor vehicle used in interstate commerce as an excise on the use of such highways. The proceeds of the tax were to be applied to the maintenance of public highways in the State.

The complainant objected to the tax as an infringement of the paramount power of Congress to regulate interstate commerce, or at least as a

discrimination against that commerce. But again the court upheld the right of the State to enact a law of this character saying (page 249):

"It is not denied that a state may impose a registration or license fee on those using motor vehicles in the state, although engaged in interstate commerce, or that the state may impose a reasonable charge for the use of its highways by motor vehicles so employed * * * and there is no evidence that the tax here is in itself an unreasonable charge for the privilege. But it is said that the particular scheme of taxation adopted by Connecticut imposes this tax in addition to statutory charges already made for the use of the highways in interstate commerce, and both in purpose and in effect discrimination against appellant and in favor of those operating motor vehicles in intrastate commerce.

* * * * *

"Appellant plainly does not establish discrimination by showing merely that the two statutes are different in form or adopt a different measure or method of assessment, or that it is subject to three kinds of taxes while intrastate carriers are subject only to two or to one. We cannot say from a mere inspection of the statutes that the mileage tax is a substantially greater burden on appellant's interstate business than is its correlative, the gross receipts tax, on comparable intrastate businesses. To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it."

Legislative confirmation of the judicial sanctioning of state taxation of the instrumentalities of interstate commerce is contained in the Federal Motor Carrier act of 1935. In section 302, title 49, USCA, subparagraph (c), it is provided:

"Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highway of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Investigation of authorities has failed to disclose any decision, as yet, by the Supreme Court of the United States, or by inferior Federal courts, construing the effect of the Federal Motor Carrier act of 1935 upon the powers of the states with reference to taxation and regulation of vehicles engaged in intrastate commerce. But a decision of the Texas Civil Court of Appeals and several decisions of the Supreme Court of Florida, which we believe to be sound, construe the Federal act as reserving to the states the power to tax instrumentalities of interstate commerce and to impose such police regulations as have for their object the preservation of the highways and the protection of the public from dangers arising from the use of the highways.

Railroad Commission of Texas v. Southwestern Greyhound Lines (Court of Civil Appeals of Texas), 92 SW (2d) 296, (also reported in Commerce Clearing House Public Utilities and Carriers Service—Federal pp. 17, 239)

is the decision of an intermediate court of appeals in Texas, but the opinion is well considered and should be accorded full weight.

Application was made by one Jackson to the Railroad Commission of Texas, for a certificate of convenience and necessity to operate such part of his interstate motor bus service as was furnished within the state of Texas. A competitor through appropriate proceedings challenged the jurisdiction of the Commission to entertain the application contending that the Federal Motor Carrier act of 1935, completely occupied the field of regulation of interstate commerce to the entire exclusion of the State.

The court, in reaching its conclusion that the State still possessed certain powers over interstate commerce, pointed to the following considerations as the basis for its conclusion (p. 299):

"* * * In the field of motor carrier operation over the highways, the roadbed used is one owned, built, and maintained by the state from taxes exacted from its citizens. It was not constructed for the purpose of enabling individuals or corporations to conduct a business thereon for hire, either interstate or intrastate, for their own profit, but for the use and benefit of the public. No individual or corporation has any such interest in, or rights thereon, as entitle him to conduct a business for hire over such roads. Such use of the highways is therefore only permissive, subject to regulation when granted, and may be denied or withdrawn, whenever it becomes destructive of the state's property, or dangerous to the safety of the manner and for the purposes for which such highways were constructed and are maintained by the state."

The court, after a consideration of cases determined by the United States Supreme Court, held that the term "certificate of convenience and necessity" to be issued by the State Commission, in so far as it applied to interstate operation must be given the restricted meaning of "permit" or "license". The significance of this restriction is that the Commission cannot inquire into the question of whether or not public convenience and necessity require such operation, but is limited to a determination of whether or not the structure and preservation of the highways and the safety of the public will permit such additional use of the highway.

In summing up its construction of the act, the court says, (page 303):

"* * * There should not be confused the matter of regulating such interstate commerce, granting the need and convenience of same, and the right of the state to preserve its highways and protect the public against dangers thereon, by prohibiting their use for additional commercial purposes to all such commerce whether interstate or intrastate. As to the former, that is, the matter of regulation, the right to carry on such commerce being conceded, the Federal Motor Carrier act, 1935, undoubtedly supersedes all rights of the state in that regard. The provisions of said act cover all phases of the field of regulation, e.g. facilities of the operator, equipment, routes, liability insurance, interchange of passengers and property between such carriers, hours of labor, driver's licenses, etc. Said act is too comprehensive to undertake to review it here. We have studied it carefully, however, and find no provisions in it relating to, nor vesting in the Interstate Commerce Commission the duty to pass upon, the matters of conserving the state highways or dangers

to public in the use of such highways, matters which the Supreme Court of the United States had, prior to the passage of such act, held that the state had the right and authority to determine. These matters were recognized as being reserved to the state. It must be presumed that the Congress was familiar with these holdings of the Supreme Court when it enacted such Motor Carrier act. That being true, the fact that the Federal act does not undertake to invade this field, nor to interfere with this legitimate exercise by the states of their police power in this regard, strongly negatives any intention to do so, if as a matter of law it does not indeed amount to a refusal to interfere with the rights of states with respect to these questions."

The Supreme Court of Florida in *Lowe v. Stoutamire*, 166 So 310, held that the Federal Motor Carrier act of 1935 has not deprived the States of the right to exercise the following powers in connection with interstate carriers (page 312):

"* * * registration and obtaining from the state of a formal certificate and permit to operate in interstate commerce, such certificate being grantable as a matter of right and as of course whenever appropriately sought; payment of prescribed mileage taxes exacted by the state of Florida as compensation for use of its highways; appropriate police regulation reasonably adopted to conserve the state's property right in the highways, as well as to protect the comfort, safety and convenience of citizens and the travelling public on the highways * * *."

The court held the requirement of registration was for the purpose of identifying the nature, quality, and extent of the interstate operations intended to be carried on thereunder so as to permit determination of the state mileage tax. To the same effect see *State ex rel. R. C. Motor Lines v. Florida Railroad Commission*, 166 So 840.

In short, the foregoing authorities construe the Federal Motor Carrier act of 1935 as leaving unaffected the powers of the state to regulate and to exact compensation for the use of its highways by vehicles engaged in interstate commerce. The decisions are well reasoned and, in our opinion, there is reason to believe that, should the matter be presented to the Supreme Court of the United States, that court will approve of the conclusions arrived at by the state courts.

The state of Illinois has enacted a statute imposing both a license fee and, optionally, either a flat weight tax or a mileage weight tax which applies indiscriminately both to vehicles in interstate and intrastate commerce. See Sections 9 and 9b of the Motor Vehicle law, chapter 95a, Illinois State Bar Statutes, 1935, sections 9 and 10 (1).

Section 20 of the same act contains a reciprocity clause which provides that the provisions of the act specified including those imposing a license fee and flat weight tax or mileage weight tax shall not apply to any motor vehicle owned by a non-resident of this State if he has complied with the laws in force in his state, and like exemptions and privileges are granted to residents of Illinois.

While this statute has not been judicially declared valid, there is no doubt that under the decisions of the United States Supreme Court the act is wholly proper.

II.

Limitations Upon the Grant of Powers by the State of Illinois to Cities and Villages to Tax and License Vehicles and Occupations Involving Use of the Streets.

It is clear that so far as the Federal government is concerned a municipality is not restricted from exacting compensation from motor trucks and motor buses engaged in an interstate business merely because of the interstate character of the operation. However, another question is involved in the relations of the State to its municipalities so as to require further inquiry into the extent of the powers of the municipalities upon the subject. The following statutes bear upon the power of the City to license or tax motor vehicles.

Section 96 of article V of the Cities and Villages act [Illinois State Bar Statutes, 1935, chapter 24, section 65 (96)] relating to the powers of cities and villages provides that they shall have the power:

"To direct, license and control all wagons and other vehicles conveying loads within the city, village or incorporated town having a population of less than 100,000 or more than 200,000 inhabitants or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, and the license fees when collected shall be kept as a separate fund and used only for paying the cost and expenses of street or alley improvement or repair."

In conjunction with the foregoing delegation of power the provisions of the Motor Vehicle law must be considered. Section 26 of the Motor Vehicle law is the applicable section. The state of this section is rather confused. At the 1935 session of the General Assembly the section was twice expressly amended and once expressly repealed. Both amendments are substantially the same. There is also a section 26a which was enacted at the 1935 session of the General Assembly which in substance is like section 26, in so far as the question under consideration is concerned. Since this section is unambiguous and since it covers the same subject matter as the doubly amended section 26, we shall not concern ourselves here with section 26 but shall consider section 26a as the pertinent provision of the Motor Vehicle law. This section is found in chapter 95a, Illinois State Bar Statutes, 1935, section 27 (1).

Section 26a provides:

"No owner of a motor vehicle or motor bicycle who shall have obtained a certificate from the secretary of state and paid a registration fee as hereinbefore provided, shall be required by any city, village, town or other municipal corporation within the state other than that within which said owner resides to pay any tax or license fee for the use of such motor vehicle or motor bicycle."

The section then provides for a maximum tax or license fee which may be exacted by cities and villages from their residents for motor vehicles other than motor trucks and motor driven commercial vehicles and motor vehicles which are used for public hire. As to those vehicles no maximum is prescribed.

The section further provides:

"Nor shall such owner be required to display upon his motor vehicle or motor bicycle any other plate or tax or license number than that issued by the secretary of state or by the city, village, town or other municipal corporation within the state within which said owner resides."

The present state of the law is the result of a series of enactments and amendments in which alternately cities were granted the power to impose license fees and vehicle taxes and deprived of the power. As the law now stands the city of Chicago has the right to impose license fees and vehicle taxes only upon vehicles owned by persons resident within the municipality. An informative case which sets forth the history of the litigation incident to the subject of municipal imposition of license fees and taxes is *City of Chicago v. Francis*, 262 Ill 331. That case involved an ordinance which provided for a vehicle license and the exhibition of a metal plate bearing a number. The court declared the ordinance to be in conflict with section 12 of the Motor Vehicle law of 1911 which is substantially like the present section 26a except that the prohibition was broader and the municipality was not permitted to tax even resident owners. The court declared that by the Motor Vehicle law the legislature had expressed its intention to deprive the municipalities of the power to impose vehicle license fees or taxes. The reasonableness of the policy of the State legislature is indicated in the following quotation from the opinion of the court holding the ordinance invalid, (page 335):

"The question in this case is whether the city of Chicago can compel, by ordinance, the owner of a motor vehicle, other than a motor truck or motor-driven commercial vehicle, to display thereon any other number than the number of the registration seal issued by the Secretary of State. The present statute expressly provides, 'nor shall such owner be required to display upon his motor vehicle or motor bicycle *any other number* than the number of the registration seal issued by the Secretary of State.' The ordinance in question makes it unlawful for any person to use *any vehicle* upon the streets of the city of Chicago unless a metal plate is affixed *bearing a number* issued by the city clerk of the city of Chicago. The ordinance is squarely in conflict with the State law, and must therefore be held invalid and void unless within some of the provisos. It is apparent from this law that the General Assembly by the revision of the law in 1911, and having in mind the court decisions of recent years which we have cited, intended to take certain matters in regard to the control of motor vehicles entirely out of the hands of municipal authorities. As said in *Ayres v. City of Chicago*, *supra*: 'It is a fact within the common knowledge of most persons that automobiles, other than those used in particular localities for hire, are extensively used in this State in making tours of considerable distance, in the course of which many cities, villages and towns would be visited. * * * Clearly,

the purpose of the legislature was to pass a new and complete law designed to take the place of all municipal ordinances or rules regulating the equipment and operation of motor vehicles.' This condition is becoming more apparent each year with the extended use of motor vehicles and the long distances traveled by them in short periods of time, hence the urgent need of a general law which would apply to the whole State, so that laws concerning motor vehicles being propelled about the State should not be left to the ordinances of each individual village or city in the State. The latter course would lead to confusion and in some cases to injustice. Almost any owner of a motor vehicle or motorcycle will frequently pass through several cities or villages in the course of a few hours. If the city of Chicago can compel the owner of an automobile to affix the tag of that municipality, every other city and village in the State can by ordinance do likewise. The legislature evidently had this in mind, as well as other matters which would lead to confusion unless corrected, when the law of 1911 was passed. The exception, from the law, of motor trucks and motor-driven commercial vehicles, which would necessarily be used locally, emphasizes the intent of the law in regard to motor vehicles like the one used by plaintiff in error in this case. It is undoubtedly necessary for municipalities to establish and enforce traffic regulations, and the reasonableness of municipal ordinances enforcing such regulations would depend upon the circumstances and conditions in such municipalities. Under the law a municipality may make and enforce reasonable traffic and other regulations, except as to rate of speed, *not inconsistent with* the provisions of the State law regulating the use of motor vehicles when conditions warrant them."

Subsequent to the foregoing decision the Motor Vehicle law was again amended in 1915, and the pertinent portions of section 12 were substantially like the present section 26a. Under that section 12 municipalities were given the power to tax resident owners. The village of Downers Grove passed a certain ordinance providing for the payment of a license fee by owners of motor vehicles. The ordinance was so broad that it included the taxing of motor vehicles owned by persons not residing in the village. The court in *Heartt v. Village of Downers Grove*, 278 Ill 92, gave a literal interpretation of the section and declared the ordinance invalid (page 95):

"It was stated in the opinion in more than one of these cases that it was the manifest purpose of the legislature, in enacting the law of 1911 with reference to motor vehicles, to bring the whole subject of regulating the use of motor vehicles under the control of the State; that automobiles were extensively used in making tours of considerable distance, in which many cities, villages and towns would be visited; that the legislature did not intend that the owner of an automobile should be held up and made to pay a license fee or tax by the authorities of every city, town or village which the owner visited or passed through. The reading of amended section 12 of the Motor Vehicle law shows plainly that the legislature enacted this amended section for the express purpose of complying with the rules laid down in the decisions just referred to and with the intention of making clear just when the local municipalities could require a license fee or tax from motor vehicles. The classification provided by said sec-

tion 12 beside that of the residence of the owner is (1) motor trucks, motor-driven commercial vehicles and motor vehicles used for public hire; and (2) motor vehicles not belonging to the first mentioned class and motor bicycles. The latter portion of this section has reference to the amount of the tax or license fee which may be required from residents of the municipality imposing such tax or fee. It limits the amount which may be levied on residents for the class of vehicles designated above as class 2 and does not prescribe the maximum amount for class 1. There is no power given by this section to municipalities to impose a tax or license fee on non-residents of such municipality. On the contrary, the section states that no such tax or fee shall be required of non-residents."

A case which was decided since the passage of section 26 of the Motor Vehicle law which was substantially like the present section 26a is *Roe v. City of Jacksonville*, 319 Ill 215. The ordinance in that case taxed owners of motor vehicles residing within the corporate limits of the city of Jacksonville. The court again considered the history of the law pertaining to this subject and refers to paragraph 96 of section 1, article 5 of the Cities and Villages act (hereinabove quoted in full) which grants to municipalities the right to license vehicles. The court further considers section 26 as being a modification of the original grant of power to municipalities. The ordinance of the city of Jacksonville which is confined in its operation to residents of the City is sustained by the court.

On the other hand in *City of Flora v. Borders*, 342 Ill 208, the court declared invalid an ordinance which attempted to tax all vehicles upon the streets of the City regardless of whether or not the owner thereof was a resident.

A possible question may arise by reason of section 20 of the Motor Vehicle law which exempts certain non-residents of the State from obtaining a certificate from the Secretary of State and from paying a registration fee. Since section 26a provides that no owner of a motor vehicle who has obtained a certificate from the Secretary of State shall be taxed by a municipality, it might be argued that those non-residents who have not obtained such certificate may be taxed. But in our opinion, in view of the decisions of the Supreme Court, such contention is untenable. As stated by the courts, the intention of the legislature was to withdraw all power of regulating motor vehicles from the municipalities and bring the whole subject under the control of the State. (*City v. Francis*, 262 Ill 331, 335, *supra*; *Heartt v. Village of Downers Grove*, 278 Ill 82, 95, *supra*.) The municipality therefore would have no power whatever to impose a vehicle tax or license fee were it not for section 26a which grants the power to impose such tax upon residents of the municipality. That must be regarded as the limit of the power.

It is quite apparent that the legislature as a matter of comity felt it to the best interest of the State to extend reciprocal exemptions to non-residents of the State. It would be unreasonable to interpret the Motor Vehicle law as granting to the municipalities a power to tax which the State itself felt impolitic to impose, particularly when the power, if vested in the mu-

municipalities, would be much more drastic in that non-residents would be exposed to the mercy of each city through which they might pass. The Supreme Court has already declared that such was not the legislative intent as to residents of the State and it is reasonable to presume that the same reasoning applies to non-residents whom the legislature have exempted.

In the light of the foregoing authorities we are of the opinion that in so far as Federal law is concerned the city of Chicago has power to exact compensation for the use of its streets by motor trucks and motor buses engaged in an interstate business. But so far as the state of Illinois is concerned the power of the City is restricted to exacting compensation from owners of motor vehicles resident within the City. It should be borne in mind, however, in contemplating an ordinance, that while interstate commerce may be taxed and may even be the subject of a separate classification, yet discrimination against that commerce will not be permitted. Care should be taken, in the language of the Supreme Court of the United States, that the tax should not fall with disproportionate economic weight upon the interstate commerce as distinguished from intrastate commerce.

As explained by the Supreme Court of Illinois in *Harder's Storage Co. v. City of Chicago*, 235 Ill 58, on page 88, there are three kinds of taxes which a municipality may impose upon owners of vehicles, viz: (1) an *ad valorem* tax on the vehicles, as property; (2) an occupation tax or license on the privilege of carrying on business as a carrier of passengers or freight, and (3) a license tax on the privilege of using the vehicle on the public streets.

Only the second and third kinds of tax are pertinent to this inquiry. The third kind has hereinabove been fully discussed. As to the occupation tax or license on the privilege of carrying on business, instances of the exercise of that power are found in *People v. Thompson*, 341 Ill 166, which sustained the ordinance of the city of Chicago creating the Public Vehicle License Commission, and *Capital Taxicab Co. v. Cermak*, 60 F(2d) 608, which sustained the same ordinance. The theory upon which the ordinance is sustained is that the City has the power under paragraph 42 of section 1 of article V of the Cities and Villages act to license, tax, and regulate hackmen, draymen, omnibus drivers, carters, cabmen, etc., in other words to license and tax the occupation. While a tax or license fee based upon this theory is permissible in so far as a local occupation is concerned such tax or license in so far as it attempts to license one engaged in an interstate business would be clearly invalid. *Adams Express Co. v. New York* 332 US 14, is decisive on that point. The basis upon which states may tax instrumentalities of interstate commerce is that contribution may be exacted for the construction and maintenance of the highways used by those instrumentalities. It is a tax, not upon the *occupation* but upon the *privilege of using the highways*.

A further limitation upon the power to license occupations is a result of the passage of the Public Utilities act of the state of Illinois. By that act all licensing powers theretofore exercised by municipalities over public utilities were withdrawn and comprehensive regulatory powers are now vested in the Illinois Commerce Commission to the exclusion of cities and

villages. Municipalities have no power to license public utilities which have duly obtained a certificate of convenience and necessity from the commerce commission. (*Chicago Motor Coach Co. v. City of Chicago*, 337 Ill 200; *C. N. S. & M. R. R. Co. v. City of Chicago*, 331 Ill 360). To a certain degree the power of the city of Chicago over public utilities has been again delegated to the City by the Local Transportation act which will hereinafter be discussed.

The power of the City to license occupations requiring use of the streets is clear as to operations carried on exclusively within the City. Questions arise when the operation is from a point within to a point without the City or from a point without the City to a point within the City.

Two decisions of the Appellate Court of Illinois deny the power of the City to license occupations involving operations extending beyond the City. In *City of East St. Louis v. Bux*, 43 Ill App 276, an ordinance required a license of carriers of property "from places within to places without and from places without to places within the City." The court held that the licensing power of the City was limited to those occupations carried on exclusively within the City and that the defendant who had carried property from a point outside to a point inside the City was not required to comply with the ordinance.

This decision was followed in *City of Cairo v. Adams Express Co.*, 54 Ill App 87, the court reiterating its position that the licensing power was limited to those businesses carried on exclusively within the limits of the City.

Neither of these cases however, considered a prior decision of the Supreme Court in *Gartside v. City of East St. Louis*, 43 Ill 47, which involved an ordinance requiring that a license be taken out before engaging in the "transportation of persons or property from one part of the City to another, or from places within to places without the City, or from beyond the City to the City." The court sustained the ordinance. However, it appears from the case that the operation of the defendant was entirely intra-city in scope, the hauling being done from a depot in the City to the Mississippi river. While the court was aware of the scope of the ordinance the attack was upon the ordinance generally and the question as to whether or not it could validly cover operations extending beyond the City was not directly presented to nor passed upon by the court. The facts of the case did not require a decision on this point. At any rate the decision must be deemed authority for the passage of an ordinance of this scope, although a doubt is injected into the matter by reason of the Appellate Court decisions which reach a contrary conclusion when directly confronted with the question. But until overruled or modified the *Gartside* case should be considered authority for the passage of an ordinance therein approved.

(Authorities in other jurisdictions are not in agreement upon the question. Some support the position taken by the Appellate Court of Illinois while others permit licensing of inter-city operations. An annotation in 31 ALR 594 contains authorities for each position.)

III.

Limitations upon the Grant of Powers by the State of Illinois to Cities and Villages to Regulate Traffic.

The resolution of the City Council also inquires as to the power of the Council and Mayor to prescribe certain streets over which trucks and buses may be operated. The preamble of the resolution recites that the motivating force behind any contemplated ordinance is concern for the safety of the public and preservation of the streets. Under the authorities hereinabove cited on the question of the power to exact compensation it is clear that the Council would, under Federal law, have the right to pass any reasonable regulatory ordinance calculated to promote safety of operation and to preserve the highway even though interstate commerce would thereby be affected indiscriminately with intrastate commerce. But here again we are confronted with the problem of a limited grant of power to the City by the State.

In 1935, the State legislature enacted "An Act in relation to the regulation of traffic," the short title of which is the "Uniform Act Regulating Traffic on Highways." The act is comprehensive in its scope and the manifest intention of the legislature was to withdraw from municipalities all authority theretofore exercised, except the powers specifically designated in the act, relative to traffic regulation and to substitute for all local laws a uniform State code upon the subject. The act is found in chapter 121, Illinois State Bar Statutes, 1935, section 276, *et seq.*

Sections 25 and 26 of the act provide:

"Sec. 25. The provisions of this Act shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any rules or regulation in conflict with the provisions of this Act unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this Act.

"Sec. 26. (a) The provisions of this Act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from—

1. Regulating the standing or parking of vehicles;
2. Regulating traffic by means of police officers or traffic control signals;
3. Regulating or prohibiting processions or assemblages on the highways;
4. Designating particular highways as one way highways and requiring that all vehicles thereon be moved in one specific direction;
5. Regulating the speed of vehicles in public parks;
6. Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating

any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections;

7. Restricting the use of highways as authorized in Article XVI of this Act.

(b) No ordinance or regulation enacted under subdivisions (4), (5), (6), or (7) of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate."

(Article XVI of the act referred to in section 26, relates to size, weight and load of vehicles and will be more fully discussed hereinafter.)

The act is very complete and contains numerous regulations concerning traffic. It would be a difficult matter to advise the Council what manner of regulation it could include in an ordinance. If a specific regulation were presented for approval, it could be determined whether or not it still lies within the power of the Council to pass, as not being inconsistent with the act. Thus the problem of designating certain streets over which trucks and buses may be operated, specifically presented by the resolution, can be and will hereinafter be treated. As to the general problem of what powers the Council has to regulate traffic, we can only furnish a brief resume of the act to show what regulation has been undertaken by the State. All other regulations and all additional regulations not inconsistent with State regulation which look to the promotion of safety and preservation of the streets, in our opinion would be permissible.

Article I of the act defines words and phrases used in the act. Article II relates to the operation of the act and includes sections 25 and 26 hereinabove quoted in full which limit the power of local authorities. Article III deals with traffic signs, signals, and markings. Article VI treats of accident and defines the duties of persons involved therein, requiring stopping at scene of accident, furnishing information and assistance to injured person, leaving name and address in case of striking unattended vehicles, notification of owner in case of striking fixtures on highway and reporting of accident. Section 46 provides that any city may require accident reports to be furnished to a designated municipal department. Article V deals with driving while intoxicated or under the influence of narcotics and with reckless driving. Article VI imposes a speed restriction and local authorities have only the power to alter limits of speed which the State declares are *prima facie* evidence that the vehicle is being driven at an unreasonable rate of speed. Article VII provides that vehicles shall be driven on right half of roadway and sets out rules for passing, overtaking, and following traffic. Article VIII controls the stopping and turning of vehicles and signals of the driver in connection therewith. Article IX deals with the rules of right-of-way. Article X has to do with pedestrians' rights and duties. Article XI concerns street cars and safety zones. Article XII requires vehicles to stop in certain cases. Article XIII governs stopping, standing, and parking. Article XIV contains miscellaneous regulations, prohibits the running of an unattended vehicle, requires unobstructed view of driver, prohibits coasting down grade in neutral, prohibits following

fire apparatus, crossing fire hose, putting glass on highway, and regulates overtaking and passing of school bus. Article XV relates to equipment, provides for carrying of lighted lamps, requires side marker lamps on certain vehicles which carry freight or more than seven passengers, requires lamps on parked vehicles, lamp or flag on projecting load, restricts spot lamps, requires stop lamps, permits cowl or fender lamps, regulates use of head lamps, requires two driving lamps, prohibits red lamp in front of car, establishes brake requirements, controls horns and the use thereof, requires mufflers, mirrors, windshield wipers, places restriction on tire equipment, requires safety glass, compels carrying of flares by vehicles carrying freight or more than seven passengers, regulates vehicles carrying explosives, and provides for official inspection stations.

Article XVI is of particular importance to the specific problem presented by the resolution of the Council. This article deals with size, weight, and load of vehicles and provides that operation of vehicles of the specified weight and size shall be lawful, and operations of vehicles exceeding specified weight and load shall be unlawful throughout the State. Local authorities shall have no power to alter limitations except as provided. The article sets a maximum width of 8 feet with few exceptions, and a maximum length of 35 feet including trailer, with few exceptions. Loads cannot extend on the left side of the vehicle and may on the right side not more than six inches. In case of trailers or towed vehicles, safety chains are required in addition to regular coupling devices. In section 131, certain maximum gross weight upon wheels and axles, on highways are established. Local authorities may permit, specially, sizes and weights exceeding the specified maximums. Paragraphs (a) and (c) of section 134, are of particular importance and are a full answer to the question of power of a municipality to prescribe certain streets over which trucks and buses may operate. Said paragraphs are as follows:

"(a) Local authorities with respect to highways under their jurisdiction may by ordinance or resolution prohibit the operation of vehicles upon any such highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, for a total period of not to exceed 90 days in any one calendar year, whenever any said highway by reason of deterioration, rain, snow, or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced."

"(c) Local authorities with respect to highways, under their jurisdiction may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight thereof, on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways."

(In the act "streets" is synonymous with "highways.")

The foregoing resume of the statute makes evident the comprehensiveness of the State regulations. What additional regulations may be contemplated by the Council cannot be readily anticipated by us other than the prescribing of certain streets for trucks and buses which is specifically authorized.

In rendering an opinion abstractly upon the powers of a municipality we can do no more than repeat that any reasonable ordinance designed to promote safety and preserve the streets would be valid if not inconsistent with the State traffic code.

It should be understood that throughout this opinion when we advise that the municipality has certain powers, such powers must be exercised by the City Council, which can delegate only ministerial functions to the Mayor or any other official or body.

IV.

The Act Concerning Local Transportation Companies in Chicago.

Part six of Article XII of the Cities and Villages act (concerning the city of Chicago) which was duly approved by the voters of the city of Chicago, provides [Sec. 322 (1) chap. 24, Illinois State Bar Statutes, 1935]:

"The words 'public utility' as used in this Act shall mean and include all public utilities engaged in the local transportation of passengers for hire, except railroads constituting or used as a part of a trunk line railroad system, and except interurban railroads whose principal business is not that of local transportation of passengers within the City of Chicago. No such public utility shall use or occupy any street or other public way or public place within the City of Chicago without a franchise or license from the city council * * *."

The act invests the city of Chicago with broad regulatory powers over the above defined public utilities and provides that no decisions, rule, or regulation heretofore or hereafter made by the State Public Utilities Commission or by the Illinois Commerce Commission shall interfere with the full exercise of the powers and authority conferred upon the city of Chicago.

By virtue of this act the powers of the city of Chicago have been broadened to permit the licensing, control, and regulation of certain local transportation companies carrying passengers for hire and to that extent modifies the law announced in *Chicago Motor Coach Co v. City of Chicago*, 337 Ill 200, hereinabove discussed.

The foregoing opinion may be summarized as follows:

1. The city of Chicago may impose a vehicle tax or license fee for the privilege of using the streets upon *owners of vehicles who are resident within the City*, irrespective of whether the vehicles are used in a business that is trans-continental, inter-state, inter-city, or intra-city or whether such business is that of a contract carrier or common carrier.
2. The city of Chicago may not impose a vehicle tax or license fee for the privilege of using the streets upon owners of vehicles who are *not resident within the City* regardless of their character of operation.

3. The city of Chicago may not impose a tax or license fee upon the privilege of carrying on a business of transporting passengers or freight in interstate commerce.

4. The city of Chicago may impose a tax or license fee upon the privilege of carrying on business of transporting freight or passengers within the City, that is, from one place within the City to another place within the City, and possibly (although the matter is not free from doubt) from a place within the City to a point outside the City within the State or from a point outside the City within the State to a point within the City, provided that the business is not that of a public utility not engaged in local transportation of passengers within the city of Chicago, which has obtained a certificate of convenience and necessity from the Illinois Commerce Commission.

5. The city of Chicago may impose a tax or license fee and may otherwise regulate all public utilities engaged in the local transportation of passengers for hire, except railroads constituting or used as a part of a trunk line railroad system and except interurban railroads whose principal business is not that of local transportation of passengers within the city of Chicago.

6. The city of Chicago may prescribe certain streets over which trucks, buses, and other vehicles may be operated, with a view to promoting safety and preserving the streets, whether the operation be trans-continental, interstate, inter-city, or intra-city, except where the Illinois Commerce Commission or the Interstate Commerce Commission has duly granted certificates of convenience and necessity over certain prescribed routes.

7. The city of Chicago may prescribe all reasonable traffic regulations not inconsistent with the Illinois "Uniform Act Regulating Traffic on Highways," which shall govern all motor vehicles, whether engaged in trans-continental, interstate, inter-city, or intra-city operation.

LICENSING OF SUBURBAN TAXICABS

(No. 9664—W.V.S.—October 22, 1937—4½ pp.)

The City may not impose a tax or license for the privilege of using the streets of Chicago upon taxicabs licensed by the city of Evanston and carrying passengers into Chicago as the Motor Vehicle act prohibits the imposition by any municipality of a tax or license fee upon a motor vehicle which has paid the State motor vehicle registration fee unless the owner of the vehicle resides in the municipality.

It is not free from legal doubt as to whether the City has power to license the occupation of carrying passengers for hire when that occupation is carried on partly within and partly without the City.

Citations:

Statute: Motor Vehicle act, sec. 26a.

Cases: City of Benton v. Whaley, 230 Ill App 309 (1923).

City of Flora v. Borders, 342 Ill 208 (1930).

City of East St. Louis v. Bux, 43 Ill App 276 (1892).

City of Cairo v. Adams Express Co., 54 Ill App 87 (1894)

Gartside v. City of East St. Louis, 43 Ill 47 (1867).

Other references: 31 ALR 594.

LRA (19188) 891.

OPINION OF FOREGOING SYNOPSIS

In your letter of October 8, 1937 and in the synopsis as to the taxicab situation which you transmitted with your letter, you called attention to the fact that the taxicabs licensed by the city of Evanston carry passengers in the city of Chicago. You pointed out that these Evanston taxicabs are not inspected by the city of Chicago, nor do they pay any license fees to the City. You suggested that this problem might be solved "by ordinance compelling a taxicab, licensed by some other jurisdiction, to obtain some special form of license and make the license fee as much, if not higher than those fees paid in Chicago. I believe that it is possible and perfectly legal for the city of Chicago to prohibit taxicab operators from other jurisdictions plying their trade upon the streets of Chicago."

Since receiving your letter, we have again considered the problem of the scope of the City's authority over the operations of taxicabs licensed by other municipalities. There are two possible forms of taxes or licenses which a municipality may impose upon the taxicab operations: (1) a tax or license upon the privilege of using the taxicab upon the streets of the municipality, and (2) a tax or license upon the occupation of carrying passengers for hire.

The possibility of imposing a license fee upon the privilege of operating a motor vehicle upon the streets of Chicago is, in our opinion, foreclosed by the provisions of the Motor Vehicle act. Section 26a of that act provides:

"No owner of a motor vehicle or motor bicycle who shall have obtained a certificate from the Secretary of State and paid the registration fee as hereinbefore provided, shall be required by any city, village, town or other municipal corporation within the State *other than a city, village, town or other municipal corporation in which the owner resides* to pay any tax or license fee for the use of such motor vehicle or motor bicycle

* * * * *

The language now found in section 26a has been a part of the Motor Vehicle act since 1911. It has frequently been construed.

In *City of Benton v. Whaley*, 230 Ill App 309 (1923), the question of the right of a city to impose by ordinance a license fee for the use of its streets upon the owner of a taxicab licensed by another municipality was squarely presented, and the provision of the Motor Vehicle act corresponding to that which has been cited was held to prohibit the enforcement of the ordinance. In that case the defendant was a nonresident of the city of Benton who maintained facilities for receiving orders by telephone within the city of Benton and whose trips took him "in, about and through the city of Benton."

In *City of Flora v. Borders*, 342 Ill 208 (1930), the City sought to impose a wheel tax ordinance upon the defendant who lived and had his place of business outside of the City. Although he did occasional hauling, for hire, within the City it was held that the statutory provision cited prevented the imposition of a tax or license upon the use of the defendant's truck by any city or municipal corporation other than the one in which he lived.

In our opinion the decisions in these cases, and in the numerous other cases cited in these opinions, preclude the possibility of the imposition by the city of Chicago of a tax or license for the privilege of using the City streets upon the Evanston taxicabs.

The power of the City to employ the second possible form of taxation—upon the occupation of carrying passengers for hire—is not clear. It has been squarely held in two decisions of the Appellate Court that the power of a city to license occupations is confined to those occupations which are carried on exclusively within the city. These cases are *City of East St. Louis v. Bux*, 43 Ill App 276, and *City of Cairo v. Adams Express Co.* 54 Ill App 87.

Neither of these cases consider the earlier decision of the Supreme Court in *Gartside v. City of East St. Louis*, 43 Ill 47, which involved an ordinance requiring that a license be obtained before engaging in the "transportation of persons or property from part of the City to another, or from places within to places without the City, or from beyond the City to the City." The facts before the court in that case, however, involved strictly intra-city operations of the defendant. The validity of the ordinance if applied to operations extending beyond the City was not considered. The authorities from other jurisdictions upon the question of the power of a municipality to license occupations carried on partly within and partly without the city are not in agreement. Some of the cases in other jurisdictions are collected in annotations in 31 ALR 594 and LRA, 1918-B, 891. In the latter annotation the editor states:

"* * * The view is taken in most of the cases that acts, in substance empowering municipalities to license and regulate vehicles used for hire within their limits, do not authorize the passage of ordinances attempting to impose a license or tax on vehicles which undertake to transport for hire between points within a municipality and points with-

out, or which merely pass through the streets of a municipality in going to and from points without its limits. * * *

In addition to the serious legal doubt which exists as to the power of the City to license occupations which are carried on partly within and partly without the City, the wisdom of an attempt by any municipality in this metropolitan area to extend its licensing powers to extra-mural activities may well be questioned. Undoubtedly any such effort would result in retaliatory legislation by other municipalities in the area.

In our opinion the transportation of passenger from point to point within the city of Chicago by taxicabs which are not licensed by the City is a violation of existing ordinances.

* * * * *

MOTOR VEHICLES OWNED BY RESIDENT COMPANY AND GARAGED IN SUBURBS

(No. 9485—R.N.—April 12, 1937—1½ pp.)

Motor vehicles owned by a company located within the City, which are garaged in suburbs of the City, are required to bear City motor vehicle tax stickers.

Municipalities other than the one in which the owner of a motor vehicle resides have no right to demand that the motor vehicle bear any vehicle tag other than a tag or sticker from the municipality within which the owner resides.

CITY VEHICLE LICENSE FOR TRUCK OWNED BY CITY CORPORATION OR BY SUBURB RESIDENT

(No. 9456—R.N.—March 15, 1937—2 pp.)

A truck owned by a corporation whose place of business is in the City must bear a City vehicle tax sticker regardless of the fact that it may be garaged in Oak Park. If, however, the truck is not owned by the corporation but by an individual who resides in Oak Park and who has purchased an Oak Park vehicle sticker, he cannot be compelled to purchase an additional sticker from Chicago.

The title to a truck not being in the name of the corporation, the truck cannot carry its name.

Citation: Code '31: 2065.

VEHICLE LICENSE FOR NON-RESIDENT FOREIGN CORPORATION

(No. 9437—Public Vehicle License Commissioner—R.N.—February 20, 1937—1½ pp.)

Trucks of a company which is incorporated under the laws of Wisconsin do not need Chicago vehicle licenses to operate within the limits of the City as the ordinances requiring Chicago vehicle licenses relate only to resident owners of vehicles.

CITY VEHICLE TAX FOR RESIDENT CORPORATIONS ENGAGED IN INTERSTATE COMMERCE

(No. 9298—M.H.F.—October 1, 1936—2 pp.)

The vehicles of an Illinois corporation, having its principal office in Chicago with branch offices in other states and engaged exclusively in the interstate carriage of freight by truck among other states, are nevertheless subject to license under the City's wheel tax ordinance. The vehicle license fee is not an occupational tax, but rather a police and traffic measure imposed on resident owners of all motor vehicles.

Citation: 18 Op. Corp. Coun. 469 (No. 8755), 472 (No. 8975).

VEHICLE LICENSE FOR PRIVATE TEAMS HAULING CITY-OWNED VEHICLES

(No. 9474—City Comptroller—R.N.—April 1, 1937—1 p.)

Owners of teams being used to haul City-owned trailers are not required to obtain vehicle licenses for those teams as the tax is on the vehicle, and City-owned vehicles are exempt from the requirements of the wheel tax license ordinance.

Citation: Code '31: 2073.

LICENSE FEES FOR DELIVERY TRUCKS

(No. 9302—*Commissioner of Police—A.F.G.—October 8, 1936—1½ pp.*)

The section of the Revised Chicago Code of 1931 which concerns license fees for automobile delivery wagons and trailers used for light delivery or for conveying loads of one ton or less, probably means that a heavy capacity truck used for conveying loads of one ton or less complies with the section when it bears a light delivery license.

Citations: Code '31: 2066.

Coun. J. [1935-36] p. 477 (amendment to sec. 2066).

LICENSE FOR TRAILER AND SEMI-TRAILER

(No. 9468—*Commissioner of Police—R.N.—March 30, 1937—1½ pp.*)

When a tractor is operated in conjunction with one semi-trailer, no additional license is required for the semi-trailer, the license for the tractor being based upon the combined weight of the tractor and semi-trailer. If more than one semi-trailer is attached to a tractor, a five dollar license fee must be paid for each such additional semi-trailer.

Trailers, as distinguished from semi-trailers, require a separate license for each trailer.

Citation: Illinois Motor Vehicle act, sec. 9.

(5) Other Subjects of License

LICENSING OF BARBERS, BARBER SHOPS, DETECTIVES, DETECTIVE AGENCIES, DISTILLERS, AND BREWERS

(No. 9524—*Superintendent, Bureau of License—A.F.G.—May 24, 1937—3½ pp.*)

The Bureau of License has no authority to enforce sections of the Revised Chicago Code of 1931, which provide for the licensing

of barber shops, for the reason that at the time the City adopted those sections it had no specific power to license barber shops. In 1935, an amendment to the Cities and Villages act gave cities concurrent power with the State to tax, license, and regulate barbers and barber shops, and a new ordinance based on that amendment should be prepared.

With regard to sections of the Revised Chicago Code of 1931 which provide for the licensing of private detectives, the City had specific power to adopt those sections at the time of their enactment and, although in 1933 the State took to itself the power to license and regulate detectives and detective agencies, in 1935 it restored the power to the cities. Therefore, the sections licensing private detectives are again in full force.

The City no longer has power to license and regulate distillers and brewers, because an act of the General Assembly in 1934 expressly vested the power to license and tax distillers and brewers in the State.

Citations:

- Statute:** Cities and Villages act, art. V, sec. 91.
Ill. Laws (1933), p. 469 (License and Regulation of Detectives); (sp. sess., 1933-34), p. 57 (Liquor Control act).
Ordinance: Code '31: 3285-3293, 3358-3373.

OPINION OF FOREGOING SYNOPSIS

In your letter of April 1, 1937, in reference to the power of the City to license certain occupations, you ask three questions which are as follows:

"1. Have I the authority to enforce the present provisions of the Code relating to the licensing of barber shops, detective agencies, and private detectives, in view of the fact that the legislature amended section 91 after it had passed bills providing for a State license for these occupations?

"2. If I have not the authority to enforce the present provisions of the Code, could a new ordinance on these subjects be passed and enforced?

"3. In regard to distillers and brewers, there being no license ordinance in existence at the present time, would a City ordinance passed on this subject be in conflict with the State Liquor Control law?"

In reply to your first query we wish to say that in our opinion you have no authority to enforce the present ordinance licensing barber shops covered by sections 3285 to 3293, inclusive, Revised Chicago Code of 1931, for the reason that at the time of the adoption of those sections the City

had no specific power to license this occupation. In 1909 the legislature enacted a law regulating the business of and licensing barbers. In 1935 the legislature amended paragraph 91 of article V of the Cities and Villages act empowering cities and villages "to tax, license and regulate * * * barbers, and barber shops." Thus the City for the first time was given authority to tax, license, and regulate barbers and barber shops. We think that by this amendment the cities are given concurrent power with the State to tax, license, and regulate barbers and barber shops. We are of the opinion, however, that a new ordinance on this subject should be prepared based on the authority given by amended section 91.

In reference to detective agencies and private detectives, we have a different situation. In 1919 the legislature by an amendment to section 91, article V of the Cities and Villages act authorized cities and villages to tax, license, and regulate detective agencies and private detectives. An ordinance based on this power was enacted by the City Council and appears in the Revised Chicago Code of 1931 as sections 3358 to 3373, inclusive.

In 1933 the General Assembly enacted an act entitled "An Act to provide for the licensing and regulating detectives and detective agencies," approved June 26, 1933. By virtue of the well-known rule of construction laid down by our Supreme Court, that where the State has delegated power to cities and villages to license and regulate a business or occupation and subsequently assumes that power itself, the cities and villages are automatically divested of that power, the City was without authority to enforce sections 3358 to 3373, inclusive, of the Revised Chicago Code.

But in 1935 the General Assembly again reenacted section 91 of article V with some additional occupations included therein. The provision in reference to "detective agencies and private detectives" was reenacted and as the General Assembly is presumed to have knowledge of the act, the title of which is quoted above, we must assume that the legislature intended to restore to cities and villages the power to tax, license, and regulate these occupations. If it intended otherwise, these words would have been deleted in the bill.

Inasmuch as the City had the power at the time of the adoption of the ordinance in reference to detective agencies and private detectives, we are of the opinion that, in view of the act of 1935, the ordinance is still in full force and effect.

We think the foregoing fully answers your second question.

Regarding your third question relating to the City's power to license and regulate distillers and brewers, we think that the power given in section 91 of article V of the Cities and Villages act in this regard is no longer in force.

By an act entitled "An Act relating to alcoholic liquors," approved and in force January 31, 1934, power to license and tax distillers and brewers is expressly vested in the State and by the rule of construction referred to above the City is without power to tax these occupations.

POWER TO LICENSE AND REGULATE BUILDING CONTRACTORS ¹³

(No. 9438—Chairman, Committee on License—A.F.G.—February 26, 1937—2½ pp.)

The City does not have power to enact an ordinance licensing and regulating building contractors.

Citations:

Statutes: ISBS '35, 24: 65 (61, 63, 66, 78).

Case: Arms v. Chicago, 314 Ill 316 (1925).

Other reference: Op. Corp. Coun. (1916), p. 673.

OPINION OF FOREGOING SYNOPSIS

On January 28, 1937, you advised that there is pending before your committee an order directing that an ordinance be drafted to license and regulate building contractors, and ask our opinion whether or not the City Council has power in the premises.

Municipal corporations derive their existence and their powers solely from the General Assembly. They have no inherent power. In order to legislate upon or with reference to a particular subject or occupation they must be able to point to a statute which gives them the power to do so. Since a city has no power except by delegation from the General Assembly to license any occupation or to require the payment of a tax for the privilege of engaging in it, the power must be expressly granted in the city's charter or necessarily implied in or incident to the power expressly delegated.

The powers of city councils in cities are enumerated in the hundred odd clauses of article V of the Cities and Villages act (Illinois State Bar Statutes, 1935, p. 344) and this enumeration is the exclusion of all other subjects. If the City has the right to license building contractors it must be found in one or several of these clauses. Clause sixty-one authorizes the City "to prescribe the thickness, strength and manner of constructing stone, brick and other buildings and construction of fire escapes therein"; clause sixty-six, "to regulate the police of the city or village and pass and enforce all necessary police ordinances"; and clause seventy-eight gives the Council authority "to do all acts and make all regulations which may be necessary or expedient for the promotion of health or suppression of disease."

Under clause sixty-one the City has authority to enact building regulations for the safe construction of buildings, but we do not believe the clause is broad enough to authorize the Council to license and tax building contractors engaged in carrying out these regulations. In *Arms v. City of Chicago*, 314 Ill 316, an ordinance providing for the examination and

¹³ For a general discussion of this subject, see 1 ALR 964.

licensing of electrical contractors was held invalid because of lack of power in the City to enact it notwithstanding that the City had express power under the sixty-third clause of article V to prevent the dangerous construction and condition of apparatus used in and about buildings and to cause the same to be removed or placed in a safe condition when considered dangerous.

This office has previously held that the City is without power to compel registration of and impose a registration fee upon persons engaged in the business of constructing and repairing buildings. [*Op. Corp. Coun.* (1916), p. 673.]

While it is true that ordinances have been adopted providing for the examination and licensing of certain contractors engaged in certain branches of the building industry, such as masons, plumbers, electrical contractors, and persons having charge of steam boilers, the City in every case can point to a statute specifically authorizing such an ordinance.

In the absence of such authority in the case of building contractors, we do not believe the City Council has power to enact such an ordinance.

CIGARETTE DEALER'S LICENSE FOR SALE OF CIGARETTES BY MACHINE ¹⁴

(No. 9324—C.P.H.—July 16, 1936—2½ pp.)

Any person in charge of premises where cigarettes are sold must obtain a license even though they are sold by a machine for which the person receives only rental charged for the space occupied by the machine.

Citation: Code '31: 3787.

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of June 16, 1936, requesting advice as to whether the proprietor of a store in which a cigarette vending machine is placed is required to obtain a license for the sale of cigarettes, even though said proprietor has no interest in a machine other than the rental, which is

¹⁴ The City Council by an amendment to the Revised Chicago Code of 1931 (sec. 3792-A) passed December 2, 1936, prohibited the sale of cigarettes in Chicago by automatic vending machines. (see *Coun. J.*, 1936-37, p. 2669.) The ordinance was upheld by the United States Circuit Court of Appeals, Seventh Circuit, in the case of *Illinois Cigarette Service Co. v. Chicago*, 89 F(2d) 610 (1937).

charged for the space it occupies, please be advised that section 3787 of the Revised Chicago Code of 1931 provides as follows:

"Retail tobacco dealer defined—license—application—fee—expiration).

For the purpose of the following provisions a retail tobacco dealer is hereby defined to mean any person, firm or corporation selling, offering for sale, exposing for sale or keeping with the intention of selling or exchanging cigarettes or cigarette papers or wrappers in the city. No person, firm or corporation shall engage in the business of retail tobacco dealer without first having obtained a license as hereinafter provided.

"Any person, firm or corporation desiring a license to sell cigarette papers or wrappers in the city shall make written application therefor, which shall conform to the general provisions of this ordinance relating to applications for licenses, and if the Mayor shall be satisfied that such person or persons is or are of good character and reputation and suitable to be intrusted with the sale of cigarettes, he shall cause the city clerk to issue a license to such applicant upon the payment to the city collector of a license fee at the rate of one hundred dollars per annum; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, strychnia, cocaine, or any other deleterious or poisonous drug or drugs.

"Such license shall authorize the person, firm or corporation therein named to expose for sale, sell or offer for sale cigarettes and cigarette papers and wrappers at the place designated therein.

"Every such license shall expire on the thirty-first day of December following the date of its issuance, and may be issued for a sum not less than the annual fee hereinbefore prescribed under the following conditions:

"If the applicant for a license hereunder engages in the sale of cigarettes or cigarette papers at any time during the months of January, February or March, he shall be required to pay the annual fee of one hundred dollars; if such sales are commenced at any time during the months of April, May or June, a license shall be issued upon the payment in advance of the sum of seventy-five dollars; if such sales are commenced at any time during the months of July, August or September, a license shall be issued upon the payment in advance of the sum of fifty dollars; if the applicant engages in the sale of cigarettes at any time during the months of October, November or December, a license shall be issued upon the payment in advance of the sum of twenty-five dollars; and no license shall be issued for a less sum than twenty-five dollars."

The proprietor of the premises is responsible for the sale of cigarettes on the premises whether by medium of machine or otherwise and one cannot evade responsibility on the ground that the machine belongs to someone else.

A license being required for the sale of cigarettes under the provisions of the above section of the Code, any person in charge of the premises, where cigarettes are sold, either by machine or otherwise, must first secure a license.

CLEANING AND DYEING ESTABLISHMENT WITHIN 100 FEET OF THEATER

(No. 9607—A.F.G.—August 31, 1937—2 pp.)

If a cleaning and dyeing establishment which has been licensed by the City is located within one hundred feet of a theater contrary to the City's ordinances, a protest against the reissuance of a license to the cleaning and dyeing establishment setting out that fact may be filed with the City Collector, the Building department, and the Fire Prevention bureau.

Citation: Code '31: 3392-3401.

SON'S OPERATION OF FATHER'S TRUCK WITHOUT CHAUFFEUR'S LICENSE

(No. 9605—C.N.—August 26, 1937—1½ pp.)

A son employed by his father to operate a commercial motor truck is required by State law to be licensed as a chauffeur. The fact that the father has a chauffeur's license does not permit the use of the truck by the son in the transportation for hire of either passengers or merchandise.

Citation: ISBS '35, 95a: 28.

BAKERS' LICENSE FEE

(No. 9588—M.H.F.—August 9, 1937—1½ pp.)

A bakery establishment must pay that portion of the bakers' license fee measured by the number of bakery vehicles employed, notwithstanding that it does not peddle bakery products from its vehicles, but uses its vehicles only to convey its products from the place of their manufacture to the company's retail stores.

LAUNDRY VEHICLE LICENSE

(No. 9645—*Superintendent, Bureau of License—A.C.—October 18, 1937—2½ pp.*)

A motor vehicle which is used to distribute towel and linen supplies, the washing and ironing of which is done by a licensed laundry, is not a laundry vehicle used by a person or company operating a laundry within the meaning of the laundry licensing provisions of the Revised Chicago Code of 1931, and so is not subject to a fifty-cent license fee for each laundry vehicle used by a person or company operating a licensed laundry. Instead, the vehicle comes within the definition of a laundry vehicle and is required to obtain a license for which the fee is ten dollars.

Citation: Code '31: 3507, 3514, 3515, 3517.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 15, 1937, requesting our opinion as to whether or not section 3515 of the Revised Chicago Code of 1931, as amended, is applicable to (a person) who operates a motor vehicle and distributes towel and linen supplies.

It appears from your letter that (the person in question) operates a motor vehicle for the purpose of distributing towel and linen supplies; the washing and ironing is done by a licensed laundry.

Sections 3507, 3514, 3515, and 3517 of the Revised Chicago Code of 1931, as amended, provide as follows:

"3507. *Laundry defined.*) Any place, building, structure, room, establishment, or portion thereof, which is used for the purpose of washing, drying, starching, or ironing shirts, dresses, underwear, collars, cuffs or other wearing apparel, table, bed or other household linens, towels, curtains, draperies or other washable fabrics, such work being done for the general public, shall be deemed a laundry and subject to the provisions of this chapter.

"The word 'laundry,' as used in this chapter, shall also be held to include any towel or linen supply laundry maintained or operated for the purpose of washing, drying, starching or ironing towels, aprons, napkins, table linens, washable clothing, or other similar article, the property of such laundry, but rented or loaned for a consideration to patrons or customers of said laundry.

"The word 'laundry,' as used in this chapter, shall also be held to include any private laundry maintained or operated in connection with any hotel, restaurant or public institution, except a hospital or charitable institution where no charge is made for laundry services.

"The provisions of this chapter shall not apply to any person engaged in doing custom laundry work at her home for a regular family trade, nor to any room, rooms or portion thereof, located in a tenement house or other dwelling, in which domestic laundry work is done by or for the occupants of such building exclusively."

"3514. *Laundry vehicle defined.*) The term 'laundry vehicle,' as used in this article, shall be construed to mean any wagon, automobile or other vehicle used for the purpose of collecting and delivering laundry within the city limits of the city of Chicago."

"3515. *License required.*) No person, firm or corporation shall operate, or cause to be operated, on any of the streets, alleys or other public places of the city of Chicago, any laundry vehicle as defined in this article without first having obtained a license for same as hereinbefore required."

"3517. *License fee.*) The annual license fee for each laundry vehicle shall be ten dollars; provided, however, that any person, firm or corporation operating a licensed laundry that uses a vehicle or vehicles in connection with such laundry establishment, in case the vehicle tax for the current year has been paid thereon, shall be entitled to receive a laundry vehicle license for each such laundry vehicle for a sum of fifty cents; provided further, that the number of laundry vehicle licenses issued at such rate of fifty cents to any person, firm or corporation shall not be in excess of the number of vehicle tax licenses procured by such person, firm or corporation."

The vehicle in question is specifically covered in the definition contained in section 3514. It is not a laundry vehicle used by one operating a "laundry" as defined in section 3507 and is therefore not exempted by the proviso in section 3517. It is our opinion that the ten-dollar license fee is applicable to this case.

LUMBER YARD LICENSE FOR CERTAIN FURNITURE MANUFACTURERS

(No. 9646—*Superintendent, Bureau of License*—A.C.—October 18, 1937—2 pp.)

Manufacturers of furniture who pile or store new lumber in excess of 5,000 lineal feet in or about their premises for the purpose of manufacturing it into furniture are subject to the sections of the Revised Chicago Code of 1931 which require that a lumber yard or lumber store house license be obtained to pile or store new lumber in excess of 5,000 lineal feet for any purpose other than the purpose of "repair, erection or construction

of improvements on the premises where so stored or piled, or the premises adjacent thereto."

Citation: Code '31: 3537-3540-B, 3557, 3559.

LICENSE OF DEALERS IN SOLID FUEL

(No. 9704—*Superintendent, Bureau of License—M.H.F.—November 16, 1937—3½ pp.*)

All dealers in solid fuel, whether within or outside of the fire limits of the City, are subject to the solid fuel dealers' license if they make deliveries within the fire limits, except that a non-resident dealer may sell and deliver coal and solid fuel in the City without a license if a license is not required of Chicago dealers by the municipality in which that non-resident dealer resides.

The frontage consent section of the Solid Fuel Dealers' ordinance operates prospectively and does not require owners of a coal yard lawfully established prior to the date the ordinance became effective to obtain frontage consents in order to procure a license under it.

Citations:

Statute: Cities and Villages act, art. V, sec. 93.

Ordinances: Coun. J. (1937-38), pp. 4211-15, 4218, 4305, 4306, 4585, 4621.

Other reference: 18 Op. Corp. Coun. 525.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your request for advice regarding the ordinance passed by the City Council, August 5, 1937 (*Coun. J.*, pp. 4211-14), licensing and regulating dealers in solid fuel and firewood and other ordinances eliminating the coal selling privilege formerly accorded to licensed dealers in hay, straw, grain, and mill feed, and to peddlers.

As originally enacted the ordinance for dealers in solid fuel and firewood subjected to license (1) coal yard owners within the fire limits of the City and (2) dealers in solid fuel who were not coal yard owners. Because the City's ordinance licensing dealers in hay, straw, grain, and mill feed conferred upon such dealers the right to sell coal, this ordinance was amended to repeal such right or privilege (*Coun. J.*, August 5, 1937, p. 4215). Likewise the peddler's ordinance was amended to eliminate

the privilege theretofore given peddlers of selling coal, coke and charcoal under a peddler's license (*Coun. J.*, August 5, 1937, p. 4218). From the effective dates of these ordinances all dealers in solid fuel within the fire limits of the City will be required to be licensed under the Solid Fuel Dealers' ordinance.

On August 31, 1937 (*Coun. J.*, pp. 4305, 4306), the Solid Fuel Dealers' ordinance was amended for the purpose of correcting certain inaccurate section numbering.

On October 18, 1937 (*Coun. J.*, pp. 4585) the Solid Fuel Dealers' ordinance was further amended by striking out the words "within the fire limits of the City" in paragraphs (d) and (e) of section 3341 as printed in the *Journal of the Proceedings of the City Council* of August 5, 1937, on page 4211, and also by amending section 3344 so as to impose a license fee upon each coal yard owner for each separate place of business maintained or conducted by him based upon the total tonnage of solid fuel sold, delivered or sold and delivered within the fire limits of the City, and so as to impose a license upon each dealer in solid fuel or firewood within the fire limits of the City for each separate place of business maintained or conducted by the licensee within the City. The purpose of these last mentioned amendments is to require coal yard owners to pay license fees based upon the total tonnage of the solid fuel sold and delivered by them within the fire limits of the City and to require a license fee from each dealer in solid fuel or dealer in firewood within the fire limits of the City for each separate place of business maintained or conducted by the licensee within the City. We understand this to mean that all dealers in solid fuel, whether within or outside of the fire limits, are subject to license provided they make deliveries within the fire limits.

Under date of November 3, 1937 (*Coun. J.*, p. 4621), section 3342 of the Solid Fuel Dealers' ordinance was further amended by the insertion of a proviso reading that no license shall be required of any coal yard owner or dealer in solid fuel for any place of business maintained or conducted by such coal yard owner or dealer in solid fuel and licensed as such by any municipality which has adopted an ordinance granting privileges similar to those contained in the City's Solid Fuel Dealers' ordinance. As we understand it, the purpose of this amendment is to permit non-resident coal dealers to sell and deliver coal in Chicago without a license provided that Chicago dealers are not subject to license under ordinances of municipalities wherein the first mentioned dealers are resident.

With reference to section 3349, the frontage consent section of the Solid Fuel Dealers' ordinance, our interpretation of this section is that it operates prospectively and so as not to require owners of a coal yard lawfully established prior to the effective date of this ordinance to secure frontage consents in order to procure a license under it. In construing frontage consent provisions this department has expressed the view that establishments located prior to their enactment be not required to obtain frontage consents in order to continue in business (*Opinions of the Corporation Counsel*, vol. XVIII, page 525). Furthermore, the enabling statute which confers the right upon the City to enact this ordinance contains

the express provision that it shall not be construed to require the removal of any coal yard from any location which it lawfully occupied at the time of the passage of any ordinance passed pursuant to the statute. (Section 93, article V, Cities and Villages act.)

LICENSES REQUIRED TO PREPARE, SELL, AND PEDDLE FOOD PRODUCTS

(No. 9103—*M.H.F.*—*March 25, 1936*—2 pp.)

A concern which prepares food and delivers that food to customers by means of its own trucks¹⁵ and employees would require for each of its establishments a class III food purveyors' license, and would be subject to an annual license fee based on the number of its employees engaged in selling and manufacturing its food products.

If the concern wished to peddle its food products by means of its trucks travelling upon the highways, it would also be subject to the peddlers' license ordinance.

To have the privilege to locate its trucks on the streets or other public places of the City, it would have to obtain from the Bureau of Compensation a compensation permit for each location used; and to dispense food from these trucks standing on the public highways under compensation permits, it would require a food dispensers' license for each location.

If the concern merely manufactures and sells to middlemen, such as independent truck drivers or retailers, who in turn sell to consumers, it would then be subject to the wholesale food ordinance and be required to pay an annual license fee based on the number of its employees.

Citation: Code '31: 3010, 3013-37, 3144-50, 3573-86.

¹⁵ The Illinois Appellate Court ruled in *City of Troy v. Holton*, 287 Ill App 278 (1936) that a city has full authority to regulate the use of vehicles carrying foodstuffs within its boundaries so as to safeguard health or to insure their proper sanitation and cleanliness, but that it has no right under the pretence of police or sanitary requirements to impose a license fee or tax upon any one not a resident of the city.

LICENSING OF PARI-MUTUEL BROKERS

(No. 9732—Mayor—M.H.F.—December 23, 1937—2½ pp.)

A person who engages in the business of accepting commitments for a consideration to make legal bets at a race track may be a broker within the meaning of the law, and since the City Council has been expressly authorized to license, tax, and regulate brokers, the City Council may classify such brokers as real estate brokers, stock brokers, pari-mutuel brokers, or race-bet brokers for purposes of taxation and regulation¹⁶.

The Horse Racing act permits betting on horse races at a licensed horse race meeting by the pari-mutuel or certificate system of wagering conducted at the track. There is nothing in that act which indicates any intention of the Legislature to limit the right or privilege of pari-mutuel betting to one in person and to forbid employment of an agent.

Citations:

Statute:	Horse Racing act.
Ordinance:	Coun. J. (1937-38), p. 5016 (Pari-mutuel brokers license).
Case:	People v. Monroe, 349 Ill 270 (1932).

OPINION OF FOREGOING SYNOPSIS

The statutes of Illinois have expressly sanctioned pari-mutuel wagering on horse races at race tracks as a means for encouraging the breeding of and improvement in horses. The Supreme Court of Illinois has held that the Horse Racing act does not violate the constitutional provision against lotteries or gift enterprises and that it is not contrary to public policy to legalize betting on horse races. There is, therefore, no moral turpitude involved in sanctioning any legislation by State or City authorities which is designed to tax and regulate betting on horse races. As our Supreme Court said in *People v. Monroe*, 349 Ill 270, at page 275:

"Betting on horse races is not *malum in se* but is only *malum prohibitum*. It is not prohibited by the constitution. The public policy of a state, when not fixed by the constitution, is not unalterable but varies upon any given question with changing legislation thereon, and any action which by legislation, or, in the absence of legislation thereon, by the decisions of the court, has been held contrary to the public policy of the State, is no longer contrary to such public policy when such action is expressly authorized by subsequent legislative enactment."

¹⁶ For a contrary view, see the opinion of the Illinois Attorney General published in full in the *Chicago Daily News*, January 6, 1938.

The Horse Racing act permits betting on horse races at a licensed horse race meeting by the pari-mutuel or certificate system of wagering conducted at the track. There is a maxim of law with which every law student is acquainted which reads, "He who acts by or through another acts himself." This maxim is applicable unless there is an expressed intention to limit a right or privilege to one in person. There is nothing in the Horse Racing act which indicates any such intention on the part of the legislature. The only limitation is that the act of wagering be done in the pari-mutuel manner and that it be performed at a licensed race track.

Assuming that horse race betting may be done through agents or representatives at the race track, it is legal for any person to engage in the business of accepting commitments for a consideration to make legal bets at the track. A person who engages in such a business may be a broker within the meaning of the law and, since the City Council has been expressly authorized to license, tax, and regulate brokers, the City Council may classify such brokers as real estate brokers, stock brokers, and pari-mutuel brokers or race-bet brokers for purposes of taxation and regulation.

We have examined the ordinance licensing pari-mutuel brokers passed by the City Council December 22, 1937, and are of opinion that in its essential features it is a valid exercise of the powers of the City Council.

LICENSING OF LIVE STOCK COMMISSION MERCHANTS

(No. 9604—City Comptroller—A.C.—August 26, 1937—4½ pp.)

Live stock commission merchants who are in fact factors, and not brokers, are not subject to the City's general brokers' license ordinance. The City, although it has the express power to tax, license, and regulate brokers, does not have the power to license and regulate factors or commission merchants.

A factor as distinguished from a broker is an agent who buys and sells property in his own name, having actual or constructive possession of the property, whereas a broker always makes his contracts in the name of his employer and does not have custody or possession of the property he is buying and selling.

Citations:

- Statutes: Cities and Villages act, art. V, sec. 91.
USCA, title 7, sec. 201-229.
- Ordinances: Code '31: 3313-3320.
- Cases: Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill 561 (1905).
Braun v. Chicago, 110 Ill 186 (1884).
Hately v. Kiser, 162 Ill App 542 (1912).
Cutler v. Pardridge, 182 Ill App 350 (1914).
Chicago v. Northern Paper Stock Co., 337 Ill 194 (1930).
- Other references: Words and Phrases, 2nd series, vol. 1, p. 505.
Op. Corp. Coun. (1907-08), p. 97.

OPINION OF FOREGOING SYNOPSIS

Transmitted with your communication of August 25, 1937, are two letters from J—— Q—— of * * *, live stock commission merchants, Union Stock Yards, Chicago, protesting against the collection from Chicago live stock commission merchants of the license fees exacted of general brokers under the City's Brokers' License ordinance, section 3313 to 3320, inclusive, Revised Chicago Code of 1931. Our opinion is requested as to whether such live stock commission merchants are subject to license under the above mentioned brokers' ordinance.

Section 3313, which defines the term "general broker" reads as follows:

"Any person, firm or corporation, other than an employe of the principal or principals for whom the business is done that negotiates, buys, sells, trades, leases or handles for another, on a commission basis, or on the basis of compensation in proportion to the amount of the transaction, any stocks, bonds, mortgages, loans, investment securities, certificates of indebtedness, foreign exchange letters of credit, steamship transportation tickets, grain, provisions, produce, livestock, goods, wares, merchandise or any other commodity, article or property (except real property), whether similar or dissimilar to those herein mentioned, or acts through the medium of another licensed broker in the capacity and for any of the purposes aforesaid, shall be and is hereby defined as a general broker."

Section 3314 provides that it shall be unlawful for any person, firm, or corporation to engage in the business of, or to act in the capacity of a general broker as defined in the ordinance without first having obtained a license so to do. Section 3318 fixes the amount of the annual license fee for general brokers at \$25.00.

From the information supplied by Mr. Q—— and that given us orally by (the) traffic manager of the Chicago Live Stock Exchange, the business transacted by Union Stock Yards live stock commission merchants consists principally in acting as agents for owners and shippers of live stock consigned to the commission merchants for sale, the live stock being delivered to the commission merchants and sold by them in their own names, the commission merchants receiving compensation in the form of factorages or commissions. In some instances, we are informed, these commission merchants purchase live stock for the account of their principals upon a commission basis and attend to the shipment of the same to their principals. In all instances it is said that the commission merchants receive possession of the live stock sold or purchased by them for the account of their principals. Each of these live stock commission concerns is said to be registered under the Federal Packers and Stock Yards act of 1921, United States Code Annotated, title 7, sections 201 to 229, inclusive, and subject to the regulatory provisions thereof.

As we understand the status of Chicago live stock commission merchants they are what the law terms factors in contradistinction to brokers. A factor is generally defined to be an agent to sell goods or merchandise

consigned or delivered to him by or for his principal for a compensation, commonly called factorage or commission, while a broker is an agent employed to make bargains and contracts between other persons in matters of trade, for a compensation, commonly called brokerage, and is a mere negotiator between other parties who does not act in his own name and is not entrusted with the custody or possession when employed to buy or sell goods. (*Eau Claire Canning Co. v. Western Brokerage Co.*, 213 Ill 561, 583; *Words and Phrases*, 2nd series, volume I, page 505). The distinction between the two kinds of agents is found in the fact that the broker does not have custody or possession of the property and his contracts are always made in the name of his employer. In order to be regarded as a factor and not a mere agent or broker he must be in actual or constructive possession of the property, buying and selling it in his own name. (*Brown v. City of Chicago*, 110 Ill 186, 194; *Hately v. Kiser*, 162 Ill App 542; *Cutler v. Pardridge*, 182 Ill App 350, 357; *Opinions of the Corporation Counsel*, 1907-08, p. 97.)

While the definition of general broker found in section 3313 of the Code is sufficiently broad to cover live stock commission merchants, the Supreme Court of Illinois has held that a city may not enlarge its powers by a mere definition contained in an ordinance (*City of Chicago v. Northern Paper Stock Co.*, 337 Ill 194, 199) and the City's authority to enact the ordinance in question is, in our opinion, found in and limited by section 91 of article V of the Cities and Villages act which confers express power to tax, license, and regulate brokers. We are unable to find any source of power which expressly authorizes cities in Illinois to license and regulate factors or commission merchants. In the absence of authority authorizing the city to subject to license factors or commission merchants our opinion is that the Union Stock Yards live stock commission merchants would not properly be held subject to license under the City's general brokers' license ordinance.

The above opinion is necessarily based upon the facts therein recited. We can conceive that the same person may act as a factor in some of his dealings and in the capacity of a broker in other dealings. While live stock commission merchants ordinarily act as factors and thus are not required to procure brokers' licenses, if it should develop that in addition to their usual duties they act as brokers they should, in our opinion, be required to procure brokers' licenses.

* * * * *

LICENSING OF SALE OF LUBRICATING OILS

(No. 9044—Chairman, Committee on License—M.H.F.—February 10, 1936—31½ pp.)

Under the powers delegated to the City, the City Council has authority to license the business of storing and selling lubricating oils.

Citations:

Statutes: Cities and Villages act, art. V, sec. 65.

Ill. Laws (1919), p. 692 (Storage, Transportation, Sale and Use).

Cases: *Gundling v. Chicago*, 176 Ill 340 (1898); affirmed, 177 US 133 (1899).

Fligelman v. Chicago, 348 Ill 294 (1932).

Spiegler v. Chicago, 216 Ill 114 (1905).

Klever Karpel Kleaners v. Chicago, 323 Ill 368 (1927).

OPINION OF FOREGOING SYNOPSIS

Your committee has requested our opinion upon the question whether the city of Chicago possesses the power to license the sale of lubricating oils.

The Bureau of Fire Prevention informs us that lubricating oil is a petroleum product obtained through the distillation of crude oil; that it is one of several products obtained through the same process such as naphtha, gasoline, kerosene and fuel oil. Its flash point ranges from 325 degrees to 375 degrees Fahrenheit or about the same flash point as fuel oil, whereas the flash point of gasoline and naphtha is below 25 degrees Fahrenheit and kerosene is below 187 degrees Fahrenheit. That lubricating oil is a volatile oil will, we believe, not be denied; also that it is combustible, though not nearly so highly combustible as petroleum products having a lower flash point.

Section 65 of article V of the Cities and Villages act vests cities in Illinois with the following authority:

"To regulate and prevent storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitroglycerine, petroleum, or any of the products thereof and other combustible or explosive material, and the use of lights in stables, shops, and other places, and the building of bonfires; also to regulate, restrain and prohibit the use of fireworks, firecrackers, torpedoes, Roman candles, skyrockets, and other pyrotechnic displays."

Licensing being a means of regulating, the power to license is included within the power to regulate. (*Gundling v. City of Chicago*, 176 Ill 340; affirmed, 177 US 133.)

Under the authority delegated by the above quoted section of the Cities and Villages act the Supreme Court of Illinois has upheld the power of the city of Chicago to enact and enforce its gasoline filling station ordinance, which ordinance regulates and licenses the business of automobile filling stations. (*Fligelman v. City of Chicago*, 348 Ill 294.) In an earlier case the same court held that the City might regulate the handling of combustible oils in tank wagons on the public streets. (*Spiegler v. City of Chicago*, 216 Ill 114.) The ordinance involved in the *Spiegler* case covered not only gasoline and naphtha but also oils used for lubricating or fuel

purposes. In upholding the validity of an ordinance regulating the business of dry cleaning the Supreme Court said:

"* * * the regulation of certain conditions affecting the public safety has been delegated to a city and the efficient regulation of such conditions requires the conduct of a business peculiarly affected by them to be controlled by the limitations of a licensing ordinance, the power of the city to adopt such an ordinance will be necessarily implied. It is clearly within the police power of the city to provide by ordinance for the regulation and prevention of the storage of coal oil, naphtha, benzine, petroleum, or any of the products thereof, and other combustible or explosive material. (*Standard Oil Co. v. City of Danville*, 199 Ill. 50.) * * *" (*Klever Karpel Kleaners v. Chicago* 323 Ill 368, 374.)

While it seems reasonable to assume that the storage and sale of lubricating oils does not furnish the same fire and explosion hazard found in the storage and handling of gasoline or the more inflammable petroleum products our opinion is that under the powers delegated to the City it has authority to license the business of storing and selling such oil. Furthermore, the courts have held that the extent to which the public safety requires the conduct of a business to be regulated is a matter committed by the legislature to the City Council to determine, and unless the exercise of such judgment and discretion is manifestly unreasonable the courts will not interfere with it. (*Klever Karpel Kleaners v. Chicago*, *supra*.)

Whether there is a real need for the licensing of the lubricating oil business or whether in case that business were licensed the ordinance should also include the business of handling fuel oil are matters for the exercise of sound discretion by the City Council and concerning which we express no opinion.

That the City's power to regulate the business of storing and selling petroleum and the products thereof was not impliedly repealed by the enactment of the State act entitled "An Act to regulate the storage, transportation, sale and use of gasoline and volatile oils," in force July 1, 1919, seems reasonably certain for the reason that the city of Chicago had in force at and prior to July 1, 1919, an ordinance regulating the storage of gasoline and volatile oils and the State act above referred to excepted from its provisions cities where regulatory ordinances upon the subject were in full force and effect at the effective date of the act.

WAIVER OF JOURNEYMAN REQUIREMENT FOR MASTER PLUMBER'S LICENSE

(No. 9486—Board of Examiners of Plumbers—C.N.—April 12, 1937—2 pp.)

The Board of Examiners of Plumbers may not waive the requirement that an applicant for a license as a master plumber

must first qualify as a journeyman plumber, irrespective of the fact that an applicant may have worked five or more consecutive years with his father, who is a deceased master plumber, and wishes to continue his father's established business.

Citation: Coun. J. (1935-36), p. 581 (Board of Plumbing Engineers ordinance, sec. 4, par. 3).

VOLUNTARY APPLICATION FOR SECOND-HAND DEALER'S LICENSE

(No. 9487—*Commissioner of Buildings—M.H.F.—April 13, 1937*
—3 pp.)

The Commissioner of Buildings may approve a voluntary application for a license under the Second-Hand Dealers' ordinance but, as the City is restrained by an injunction from enforcing this ordinance, no attempts should be made to force the applicant or any other person who is engaged in the business of dismantling, wrecking, or disassembling second-hand motor vehicles or trucks and of selling the dismantled, wrecked, or disassembled parts or accessories to comply with the ordinance¹⁷.

Citation: Code '31: 3684-3697.

B. LICENSE FEES

REFUND OF AUCTIONEER'S LICENSE FEE

(No. 9082—*Chairman, Committee on Finance—E.L.M.—March 3, 1936—2½ pp.*)

A person is not entitled to a refund of the fee paid for a special auction permit when no auction was held because of lack of customers, if the fee was not paid through error or mistake.

Citation: Code '31: 2913.

¹⁷ The Illinois Supreme Court held in *Bullman v. Chicago*, 367 Ill 217 (1937), that the State statute allowing regulation of second-hand stores does not authorize the licensing of dealers in used motor vehicles.

AUCTIONEER'S LICENSE FEE REFUND

(No. 9395—Chairman, Committee on Finance—M.H.F.—January 14, 1937—1½ pp.)

An auctioneer is not entitled to have refunded to him any portion of the fee for a license under which he has operated and which was revoked for alleged misconduct by him.

Citation: 18 Op. Corp. Coun. 372 (No. 7280), 467 (No. 6443).

REFUND OF CIGARETTE LICENSE FEE WHEN LICENSE DISAPPROVED

(No. 9218—Secretary to the Mayor—M.H.F.—July 2, 1936—2½ pp.)

An applicant for a cigarette license, being within three hundred feet of a school, may not receive a license from the City, and he is entitled to a refund of the license fee deposited with the application. However, if the applicant has been selling cigarettes, he is not entitled to a refund of that portion of the deposited fee which represents the portion of the license term for which he sold cigarettes.

Citation: Code '31: 2900, 3792.

CIGARETTE LICENSE FEE DEPOSIT—AGENT ACTING FOR PRINCIPAL

(No. 9602—Secretary to the Mayor—M.H.F.—August 21, 1937 1½ pp.)

A person who has applied for a cigarette license and deposited the amount of the fee is entitled to a refund of that fee if the license is denied because the premises to be licensed is within 300 feet of a school, provided the person has not operated his business during the period for which the license application was made.

If the license application and fee deposit was made by an agent, and the principal operated the business during the period for which a license was sought, the license fee deposit should not be refunded.

Citation: Code '31: 2900, 3792.

WHOLESALE JUNK DEALER'S LICENSE FEE REFUND

(No. 9400—Chairman, Committee on Finance—M.H.F.—January 18, 1937—2½ pp.)

When persons engaged in a wholesale junk business voluntarily pay a license fee to the City under the wholesale junk dealers' licensing ordinance, that fee may not be recovered, even though the license was never issued because the location for which it was sought was not zoned for that business.

Citations: Code '22: 3511.

Code '31: 2900.

Cases: Arms v. Chicago, 251 Ill App 532 (1929).

Rhode v. Chicago, 254 Ill App 590 (1929).

Standard Oil Co. v. Bollinger, 337 Ill 353 (1930).

Yates v. Royal Insurance Co., 200 Ill 202 (1902).

Roth v. Chicago, 207 Ill App 117 (1918).

Chicago v. Klinkert, 94 Ill App 524 (1901).

Other reference: 18 Op. Corp. Coun. 464 (No. 7498, No. 6815, No. 6976, 468 (No. 6849).

OPINION OF FOREGOING SYNOPSIS

We have your communication of January 4, 1937, in which you request an opinion on the claim of H— S— S— Co. * * * for the refund of a fee of \$200.00 deposited * * * for a wholesale junk dealer's license for the year 1929 for premises located at * * *.

It appears from the file that on June 17, 1929 (application was made), for a wholesale junk dealer's license for the above premises for the year 1929 and (the fee in question was deposited) with the City Collector. The license was not issued because the location was not zoned for such a business. It further appears that the applicants at that time were engaged at the location named in the business of buying and selling scrap iron and steel, articles of junk comprised within the definition of the term "junk" as used in section 3511 of the City's wholesale junk dealer's license ordinance in the 1922 Code.

The law is well settled that there cannot be a recovery of license fees paid unless it be shown that they were paid under both protest and compulsion. (*Arms v. Chicago*, 251 Ill App 532; *Rhode v. Chicago*, 254 Ill App 590; *Standard Oil Co. v. Bollinger*, 337 Ill 353; *Yates v. Royal Insurance Co.*, 200 Ill 202; Opinion Nos. 7498, 6815 and 6976, *Opinions of the Corporation Counsel*, vol. XVIII, p. 464.)

Section 2900 of the Revised Chicago Code of 1931 provides in part as follows:

"Whenever a license is not approved and the applicant has not engaged in the business or industry for which the license was sought, the license fee paid in advance shall be refunded to the applicant, upon the recommendation of the city collector and the approval of the city comptroller."

When fees are paid voluntarily under a mistake of law there can be no recovery. (*Roth v. Chicago*, 207 Ill App 117; *Chicago v. Klinkert*, 94 Ill App 524; Opinion No. 6849, *Opinions of the Corporation Counsel*, vol. XVIII, p. 468.)

Inasmuch as it appears from the facts disclosed to us that the fee in question was voluntarily paid under the belief on the part of the applicants that their business was subject to license under the City's wholesale junk dealer's license ordinance and that the applicants engaged in the business for which they sought a license at the location named, it is our opinion that the courts would hold that claimants would not be entitled to a return of the fee so paid. Accordingly we believe the claim should be denied.

REFUND OF LICENSE FEE PAID UNDER ORDINANCE SINCE ENJOINED

(No. 9439 — City Collector — M.H.F. — February 26, 1937 — 2½ pp.)

A new car dealer which voluntarily applied for a second-hand dealer's license and without protest or duress deposited money for the license fee is not entitled to have that money refunded, even though the license has not been issued and the enforcement of the ordinance under which the fee was paid has since been enjoined. As soon as the company's application has been approved, there is no reason why the license should not be issued.

Citations:

Case: *Yates v. Royal Insurance Co.*, 200 Ill 202 (1902).

Other reference: 18 Op. Corp. Coun. 464 (No. 7498), 465 (No. 8908).

REFUND OF UNUSED PORTION OF LIQUOR LICENSE FEE AT DEATH OF LICENSEE

(No. 9119—*M.H.F.*—April 8, 1936—2½ pp.)

A refund may be granted of the unused portion of a City retail liquor dealer's license fee issued to a person who has since died, if the personal representatives of that deceased licensee do not, under court order, continue the business for the remainder of the period for which the license was issued.

Citation: Dram-Shops act, art. VI, sec. 1, par. 1.

LIQUOR LICENSE REFUNDS FOR DEALERS IN "DRY" PRECINCTS

(No. 9377—*City Collector*—*M.H.F.*—December 18, 1936—2½ pp.)

The holders of City retail liquor licenses in precincts which have voted "dry" are entitled to have refunded to them that portion of their license fees which shall represent the period from the date of actual cessation of business to the end of the period for which they were licensed.

Citation: Ill. Liquor Control act, art. IX, sec. 3, 16.

OPINION OF FOREGOING SYNOPSIS

The Illinois Liquor Control Commission, by a communication addressed to us December 15, 1936, has requested that we furnish it with a list of retail liquor dealers licensed by the city of Chicago who are entitled to refunds of portions of their retail license fees which have been paid and which represent the unexpired period for which their licenses were issued after the sale at retail of alcoholic liquor was prohibited in the precincts voted "dry" at the recent election held November 3, 1936.

Section 16 of article IX of the Illinois Liquor Control law provides in part as follows:

"Any portion of a license fee which shall have been paid and which shall represent the unexpired period for which said license was issued after the sale at retail of alcoholic liquor shall have been prohibited in

political subdivision, district, precinct or group of precincts in which the premises described in such license is located shall be refunded."

Section 3 of the same article provides that the local option vote taken under the act "shall become operative on the thirtieth day after the day of the election at which such vote is cast."

The holders of City retail liquor licenses who have complied with the provisions of the State law by discontinuing the sale of alcoholic liquor on December 4, 1936, in precincts voted "dry" at said election and who have gone out of business at their respective places of business located therein are, in our opinion, entitled to have refunded to them that portion of their license fees paid which shall represent the unexpired period for which their licenses were issued, or that portion between December 4 and December 31, 1936. However, in those cases where proceedings have been instituted in the courts to contest the validity of local option elections and where licensees have continued in business beyond December 4, 1936, and until the termination of such litigation, such licensees should not have returned to them a greater portion of their license fees than that represented by the period from the date of their actual cessation of business in the precincts voted "dry" and the end of the current license period.

* * * * *

REFUND OF LIQUOR LICENSE FEE FOR LIQUOR SOLD IN CITY-OWNED BUILDING

(No. 9244—Chairman, Committee on Finance—M.H.F.—July 22, 1936—3 pp.)

A concession in the Administration Building of the Municipal Airport which ceased selling alcoholic liquor after cancellation of its liquor license because the sale of alcoholic liquor is prohibited in any buildings owned by the City, is entitled to a refund of that portion of the license fee that covers the period during which no liquor was sold.

Citation: Ill. Liquor Control act, art. VI, sec. 11.

LICENSE REFUND FOR BUSINESS PROPERTY CONDEMNED BY UNITED STATES

(No. 9025—Chairman, Committee on Finance—E.L.M.—January 23, 1936—2½ pp.)

The unexpired portion of a filling station license fee may not be refunded, even though the United States government has condemned the business property for which the license was issued, when the fee was not paid through error or any mistake of fact and was voluntarily paid without protest or duress.

Citation: Code '31: 2900, 2913.

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper and report from the City Collector in the claim of J— H— for a refund on filling station license. You request an opinion as to whether or not the City is compelled to refund the unexpired portion of a license fee where the United States government takes over the site for which such license was issued prior to the expiration of such license.

It is a well settled principle of law that where a person, in the absence of fraud or mistake of fact, pays money to the proper municipal officers for a license voluntarily, without compulsion or duress of person or goods, and not under protest, he cannot afterward recover it back. This is so even though the ordinance under which the money was paid was invalid.

When the United States government takes over private property for a public use, whether by purchase or under its power of eminent domain, all parties in interest are notified of the action and the damage, if any, suffered by said parties in interest is ascertained and compensated for at the time of the taking.

Replying to your specific question as to whether or not the City is compelled to refund the unexpired portion of a license fee where the (Federal) government takes over the site for which such license was issued prior to the expiration of such license, we are of the opinion that the taking of such property for a public use by the United States government does not in itself constitute a legal basis on which a demand for a refund of all or part of said license could be predicated.

It appears from the report of the City Collector, hereto attached, that (the claimant) operated a filling station in conjunction with a garage at * * * * until July 16, 1935, when he was forced to vacate by reason of the action of the United States government in taking over the site for a postoffice. He now seeks a refund on both licenses for the unused period.

The fact that (the claimant) did operate his filling station and garage for the greater part of the year 1935 precludes him from recovering a refund under the provisions of section 2900 of the Revised Chicago Code of 1931 which authorizes refunds of license fees only where a license is not approved, and the applicant has not engaged in the business or industry for which the license was sought. He does however come squarely within the provision of section 2913 of the said Code which provides:

2913. *No rebate—exception.*) In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee or by reason of non-use of such license, or by reason of a change of location or occupation of such licensee; provided, however, that the provisions of this section shall not be construed as preventing the city council from authorizing a refund of a license fee or a portion thereof, where the license fee was collected through an error.

As the license fee or deposit paid by (the claimant) for 1935 licenses was not paid through error or any mistake of fact we are of the opinion his petition for refund for the unexpired portion of the year 1935 should be denied.

CHAPTER IV

RELIEF

A. Finance

PAYMENT OF RELIEF OBLIGATIONS AND ADMINISTRATIVE EXPENSES

(No. 9223—*Commissioner of Relief—J.F.G. and A.F.G.—July 8, 1936—12 pp.*)

The Commissioner of Relief, in the absence of a specific appropriation bill, may incur obligations against the City, those obligations to be paid from amounts made available for relief purposes to the City by the State Auditor of Public Accounts through the County Treasurer in accordance with the certification of the Illinois Emergency Relief Commission, and he may incur those obligations prior to the actual receipt of the money from the State Auditor of Public Accounts.

Administrative expenses and salaries in connection with the operation of the relief program for the year 1936 may not be paid from any funds now available¹⁸.

Citations:

Statutes: Cities and Villages act, art. V, sec. 102a; art. VII, sec. 2a, 3; art. VIII, sec. 1.

Illinois Emergency Relief Commission act, sec. 2.

Pauper act, sec. 17a.

Mother's Pension act, sec. 14-16.

Cases: Chicago v. Nichols, 177 Ill 97 (1898).

People v. Ohle, 345 Ill 405 (1932).

Tribune Co. v. Thompson 342 Ill 503 (1931).

Town of Fox v. Town of Kendall, 97 Ill 72 (1880).

Firemen's Benevolent Association v. Lounsbury, 21 Ill 511 (1859).

People v. Chicago, Burlington, and Quincy RR., 306 Ill 529 (1923).

People v. Chicago, 351 Ill 396 (1933).

People v. Baltimore and Ohio Southwestern RR., 359 Ill 301 (1935).

¹⁸ An act of the State legislature approved August 15, 1936, remedied this situation. See *Ill. Laws* (2nd sp. sess., 1935-36), pp. 21-23.

OPINION OF FOREGOING SYNOPSIS

We have your letter of July 1, 1936, in which you propound six questions relating to the administration of relief in the city of Chicago which we shall answer consecutively.

"(1) May the Commissioner of Relief, in the absence of a specific appropriation bill, incur obligations against the City of Chicago, such obligations to be paid from amounts made available for relief purposes to the City of Chicago by the Auditor of Public Accounts through the County Treasurer in accordance with the certification of the Illinois Emergency Relief Commission."

Answer. There is no provision in any of the laws recently passed relating to the relief and support of poor and indigent persons lawfully resident within the city of Chicago which requires or authorizes the City Council to make any appropriation during the year 1936 of the emergency relief fund to be allocated to the city of Chicago. By our statute applicable to cities and villages no contract can be legally made or expense incurred by the City unless the object of the contract of expenditure shall have been included in the general appropriation bill which is passed in the first quarter of the fiscal year, excepting contracts or expenditures warranted by necessity caused by any casualty or accident or to meet any emergency created by epidemic or any emergency requiring immediate action to suppress or prevent the spread of disease or to prevent or remove imminent danger to persons or property happening after such annual appropriation is made. (Section 3, article VII, Cities and Villages act; *City of Chicago v. Nichols*, 177 Ill 97, 101.) The statutory provision above referred to applies to the expenditure of any money which comes into the hands of the treasurer from any source. After the emergency relief fund has been paid over to the City Treasurer it must be expended as a City fund. (*People v. Ohle*, 345 Ill 405, 409.) However, it was apparently the intention of the legislature in transferring the duty and power to provide for the relief and support of poor and indigent persons from the Illinois Emergency Relief Commission to the local authorities that the emergency relief fund should be made available for expenditure by the Overseer of the Poor in townships or other officer performing the duties of an Overseer of the Poor within cities, etc., having a population of more than 500,000.

The legislature might have provided, in the act amending section 2 of the act creating the Illinois Emergency Relief Commission, that appropriations might be made by the City Council or Board of Trustees, as the case may be, from the emergency relief fund allocated to the city or village at any time during the year 1936 as it did in the act amending section 2a of article VII and section 1 of article VIII of the Cities and Villages act providing that amounts levied in the year 1936 for the relief and support of all poor and indigent persons may be appropriated and expended without being included in the annual appropriation ordinance and may be appropriated at any time during the year 1936.

Since by section 14a of the Pauper act, as amended, it is made the duty of cities, etc., having a population of more than 500,000 to relieve and support all poor and indigent persons lawfully resident therein and since

the legislature by amendment of section 2 of the act creating the Illinois Emergency Relief Commission provided that a portion of the emergency relief fund shall be allocated to the City through the County Treasurer and "used exclusively for the assistance of persons in destitute and necessitous circumstances," the State legislature itself appropriated the portion of the emergency relief fund allocated to the City for relief and support of the poor and indigent. This appropriation by the State legislature is sufficient authority for its expenditure by the Commissioner of Relief of the city of Chicago appointed pursuant to authority of section 17a of the Pauper act, as amended.

In *Tribune Co. v. Thompson*, 342 Ill 503, the court held that no appropriation in the annual appropriation bill was necessary to authorize an expenditure of the proceeds of a bond issue for the purposes for which the bonds were issued. On page 525 our Supreme Court after citing *Pryor v. Kansas City*, 153 Mo 135, 54 SW 499, said:

"* * * There the city council, under the city charter, had submitted to the voters a proposition for a bond issue to construct a city hall and sewer. At an election held for the purpose the people authorized the bond issue. The contractor who constructed the sewer brought an action against the city to recover under his contract, and the city defended on the ground that no appropriation had been made for the work in the annual appropriation ordinance. The court held that no appropriation in the annual appropriation bill was necessary, since by the bond issue ordinance, 'and the vote of the people held under the same, the proceeds of those bonds were put beyond the control of the common council either to apportion or appropriate.'"

Whatever the City or its electors may do by authority of State legislation, the legislature may do directly for the City provided that it does not impose a tax on the City or its inhabitants for the corporate purposes of the City without its consent in violation of the State Constitution. No such constitutional question is involved in matters of charity or relief. (*Town of Fox v. Town of Kendall*, 97 Ill 72; *Firemen's Benevolent Association v. Lounsbury*, 21 Ill 511; *People v. City of Chicago*, 351 Ill 396).

Our answer to your first question is "yes."

"(2) Is the Commissioner of Relief authorized under this ordinance (the ordinance creating the office of commissioner of relief and defining his duties) to incur obligations against the City of Chicago prior to the actual receipt of cash funds from the State Auditor of Public Accounts?"

Answer. In our answer to your first question we have shown that the portion of the emergency relief fund allocated to the city of Chicago in fact has been appropriated by the State legislature. All that is necessary to authorize an officer of the City to incur an obligation upon the City for any object or purpose is a valid appropriation. It has always been the practice of the various department heads and other officers of the City to incur obligations against appropriations before the receipt of cash funds for the purpose for which the appropriation is made. Without such power no department of the City could function because the appropriation is the basis for our tax levy and the taxes are not put in collection

for a year or more after the tax levy is made. Such obligation, of course, cannot be discharged without money in the treasury credited to the appropriate fund but the appropriation is sufficient basis for incurring the obligation.

Our answer to your second question is "yes."

"(3) Is the Commissioner of Relief also authorized to incur obligations for administrative salaries and expenses in connection with the operation of the relief program, such obligations to be chargeable to such monies as may be made available by the State Auditor of Public Accounts, in accordance with the certification of the Illinois Emergency Relief Commission?"

Answer. In our answer to your first question we have shown that the State legislature imposed upon the city of Chicago the duty of relieving and supporting poor and indigent persons lawfully resident therein. By an amendment to article V of the Cities and Villages act, cities, etc., having a population of more than 500,000 were given the power to relieve and support all poor and indigent persons lawfully resident therein. By an amendment to section 1 of article VIII of the Cities and Villages act, it was provided that taxes levied by such cities, etc., for the relief and support of all poor and indigent persons lawfully resident therein shall not exceed three mills on each dollar of the total equalized assessed value of all the taxable property therein. By an amendment to section 2 of the act creating the Illinois Emergency Relief Commission a portion of the emergency relief fund is to be allocated to the City and is appropriated for the assistance of persons in destitute and necessitous circumstances. The foregoing provisions considered together limit the financial power of the City for the relief and support of the poor and indigent to the sum of the portion of the emergency relief fund which may be allocated to the City and the proceeds of the three mill tax upon property within the City. No other fund is available for distribution to the poor and indigent.

In neither the act amending section 1 of article VIII of the Cities and Villages act nor in the act amending section 2 of the act creating the Illinois Emergency Relief Commission is there any express provision for payment of cost and expense of administration of relief. Since the statutory provisions for the relief and support of poor and indigent persons cannot be self-executing and since no other funds are available for that purpose, there is a necessary implication from either or both of the acts referred to that the officer charged with the duty of relieving and supporting the poor may expend so much of the funds available from either source as is necessary to carry out the powers and the duties imposed upon such officer.

The language in section 1 of article VIII of the Cities and Villages act, as amended, is comparable to the language in section 2 of the act creating the Illinois Emergency Relief Commission, as amended. In the first act it is provided that the three mill tax "shall be paid into a special fund in the city or village treasury and used *only* for the purposes for which they were levied." The purposes for which the three mill tax is authorized to be levied are found in section 102a of article V of the Cities and Villages act, which is "to relieve and support all poor and indigent persons law-

fully resident therein." The language in section 2 of the act creating the Illinois Emergency Relief Commission, as amended, is that the emergency relief fund allocated to the City shall be "used exclusively for the assistance of persons in destitute and necessitous circumstances." The two acts are in *pari materia*.

No distinction is expressly or impliedly made, so far as their use is concerned, between the proceeds of the three mill tax and the portion of the emergency relief fund to be allocated to the city of Chicago unless the use of the latter is limited by the following language contained in section 2 of the act creating the Illinois Emergency Relief Commission, as amended: "but no moneys shall be allocated or paid to any such unit (city, village, township, etc.) in excess of the needs of the destitute and needy persons therein."

We do not regard the language last quoted as a limitation upon the use of the portion of the emergency relief fund allocated to the City. We are of the opinion that it is a limitation only upon the proration of the emergency relief fund among the governmental units of the State whose duty it is to administer relief throughout the State. The power and duty of each separate unit of government through its Overseer of the Poor or other officer having like authority as the Overseer of the Poor is governed by the language in section 2 of the act creating the Illinois Emergency Relief Commission, as amended, which immediately precedes the language last quoted, viz., "Such money allocated to the county and paid over to the county treasurer shall be allocated among such other governmental units by the county board or a duly appointed committee thereof in the ratio of the relief needs of each such unit and shall be paid over to the treasurers of the several units and *used exclusively for the assistance of persons in destitute and necessitous circumstances.*"

It is obvious that persons in destitute and necessitous circumstances cannot be assisted without providing necessary means for assistance such as the investigation of the persons' needs, the purchase of supplies, the storage of records, supplies, etc., the delivery of means of subsistence, the issuance of orders or warrants for the payment of moneys, etc. These require administrative machinery essential to the giving of assistance or relief and support to the poor and indigent. If emergency relief funds are used in part for the expense of administration of relief and in part for distribution of means of support, and for no other purpose, it should follow that such use is "exclusively for the assistance of persons in destitute and necessitous circumstances" within the meaning of the legislative mandate.

Based on the foregoing considerations our answer to your third question would be in the affirmative were it not for a disturbing decision of our Supreme Court in construing language in the Mothers' Pension act similar in effect with the language in section 1 of article VIII of the Cities and Villages act relating to the three mill tax. In the Mothers' Pension act it was provided (section 16) that the proceeds of the tax authorized "shall be paid into a specific fund to be known as the Mothers' Pension Fund." By other provisions of the same act probation officers were authorized to be appointed whose duty it was to investigate all applications for relief (sections 14, 15). The County levied a tax for the Mothers' Pension Fund

and probation officers for same. In *People v. C., B. & Q. R. R. Co.*, 306 Ill 529, the court said of this tax levy (p. 532):

"* * * The tax for mothers' pensions is a county tax not to be scaled and to be preserved in its integrity for the beneficiaries. It cannot be depleted or any part of it expended in paying officers, which is a separate purpose for the benefit of a separate and different class."

Since the opinion was filed in the Mothers' Pension case, *supra*, the act was amended by the addition of language almost identical with the language in section 1 of article VIII of the Cities and Villages act, viz., "and used only for the purpose for which such tax was levied." This amendment no doubt strengthened the view of the Supreme Court in the case last cited. (cf. *People v. B. & O. S. W. R. Co.*, 359 Ill 301.)

In the light of the decision of the Supreme Court in the Mothers' Pension case, the three mill tax upon property within the city of Chicago would be unavailable, if levied, for administrative salaries and expenses in connection with the operation of the relief program. Unless there is some provision in our statutes elsewhere which expressly or by implication authorizes the use of some fund to defray the cost and expense of administration of the relief funds for the purposes for which they have been levied or appropriated, the Hickman-Lantz-Finn series of bills enacted by the State legislature are incomplete and ineffective.

The only other possible fund from which such cost and expense might be paid is the general corporate fund of the City. In our answer to your first question we have shown that no contract may be made or expense incurred by the City without an appropriation therefor. Under our statute all appropriations must be made in the annual appropriation ordinance to be passed in the first quarter of the fiscal year. The legislature provided by amendment to section 2a of article VII of the Cities and Villages act that amounts levied in the year 1936 for the relief and support of all poor and indigent persons may be appropriated and expended without being included in the annual appropriation ordinance, and by amendment to section 1 of article VIII of the Cities and Villages act it provided that such taxes for the relief and support of poor and indigent persons for the year 1936 may be levied at any time during the month of July, 1936, and may be appropriated at any time during the year 1936, notwithstanding the annual tax levy ordinance and the annual appropriation ordinance of such city or village may have been passed prior to the effective date of this act. But we have already shown that the amount levied for relief and support of poor and indigent persons may not be used for administrative expense. The legislature utterly failed to provide for any appropriation for such purpose for the year 1936.

Pending the solution of the problem created by recent legislation it was thought advisable to continue the administration of relief temporarily in the same way in which it was administered prior to July 1, 1936, providing for administrative salaries and expenses from the emergency relief fund. Having concluded that the acts providing for the use of the emergency relief fund and for the use of the proceeds of the three mill tax are for one identical purpose and that our Supreme Court in the Mothers' Pension case has ruled that a similar provision restricted such

use for the beneficiaries only, we are constrained to advise you that the administrative salaries and expenses in connection with the operation of the relief program or the year 1936 may not be payable from any funds now available.

Your questions numbered (4), (5) and (6) are based upon the assumption that you may incur obligations for payment of the salaries of your assistants and employees. Since we are of the opinion that no provision has been made for the payment of these obligations it seems unnecessary to answer these questions at this time.

USE OF PROCEEDS FROM THE RELIEF TAX WARRANT SALE FOR ADMINISTRATIVE EXPENSES

(No. 9230—*Commissioner of Relief—J.F.G.—July 14, 1936—*
2 pp.)

The proceeds from the sale of tax anticipation warrants issued against the three mill property tax levy for relief purposes may not be expended for salaries and administrative expenses incurred in connection with relief¹⁹.

The State legislature may authorize the use of relief funds for the payment of administrative salaries and expenses incurred before or after that authorization, if the legislature's intent to make such authority retroactive is clearly expressed.

Citations:

Statute: Relief act (1932), sec. 2.

Other reference: Opinion No. 9223 (this volume, p. 185).

RELIEF OBLIGATIONS AGAINST APPROPRIATIONS

(No. 9308—*Commissioner of Relief—J.F.G.—October 14, 1936—*
2 pp.)

The Commissioner of Relief has the right to incur obligations against appropriations from the City relief levy before assurance from the City Comptroller that funds are in the City treasury from the sale of tax anticipation warrants authorized to be issued against the levy.

¹⁹ See footnote 18, p. 185.

PAYMENT OF LEGAL SERVICES IN CONNECTION WITH RELIEF

(No. 9416—*Commissioner of Relief—J.F.G.—January 29, 1937*
—2½ pp.)

Legal services rendered in connection with the sale of anticipation warrants against the 1936 tax levy for relief purposes may be paid on authority of the City Council out of any money available for the administration of relief, provided that that payment together with other payments of administrative costs will not exceed eight per cent of the monies received and expended for relief during the month in which the bill for legal services is paid.

Citation: Relief act (1932), sec. 2.

OPINION OF FOREGOING SYNOPSIS

We have your letter of January 21, 1937, advising us of the receipt of an invoice of C—— and C—— in the amount of \$2,000 for legal services rendered in connection with the sale of anticipation warrants against the 1936 tax levy for relief purposes. The question which you desire to have determined is whether that bill may be paid out of that portion of the emergency relief fund which will be allocated to the city of Chicago during the year 1937.

Section 2 of "An Act to provide for relief of needy persons," approved February 6, 1932, as amended, provides that money allocated and paid over to the respective treasurers of the several units charged with the duty of providing relief shall be

"used exclusively for the assistance of persons in destitute and necessitous circumstances and for the payment of administrative costs thereof * * *.

"Moneys expended for the cost of administration of relief during any month in any local governmental unit of less than five hundred thousand (500,000) inhabitants shall not exceed, when added to all other moneys used for the payment of such costs, five per cent (5%) of the total moneys received from all sources and expended in such unit during such month for the furnishing of such relief; and in local governmental units of five hundred thousand (500,000) or more inhabitants shall not exceed eight per cent (8%) of the total moneys so received and expended, when added to all other moneys used for the payment of such costs."

It is not clear from the language used before the asterisks herein, "for the payment of administrative costs thereof," whether the word "thereof" refers to the State funds allocated to the City or whether it refers to the "assistance" of persons in destitute and necessitous circumstances.

We have adopted the latter alternative for the reason that it is clear to us that the legislative intent, as expressed in the language following the asterisks, was to make no distinction between emergency relief funds and other funds received by any local governmental unit for relief purposes in the determination of the amount of money that might be used for the payment of costs of administration.

Since Messrs. C—— and C—— performed a service necessary to secure funds for relief purposes, payment for that service may be made out of any money available for expenditure for cost of administration of relief.

The City Council may therefore authorize you to pay (the) C—— and C—— bill out of emergency relief funds allocated to the City and paid to the City Treasurer during the year 1937. We assume that payment of this bill, with other monies expended for administration costs, will not exceed eight per cent of the total monies received and expended by you for relief during the month in which the bill is paid.

ISSUANCE OF ADDITIONAL TAX ANTICIPATION WARRANTS AGAINST 1936 RELIEF TAX LEVY

(No. 9533—City Comptroller—A.F.G.—June 4, 1937—3½ pp.)

As the City did not issue or sell the full amount of tax anticipation warrants against the tax levy of 1936, as authorized by ordinance, it may now issue and sell additional warrants against that levy in an amount which, when added to the amount of warrants heretofore issued against the levy, shall not exceed seventy-five per cent of the levy, and the proceeds of the sale may be used to pay indebtedness incurred for poor relief purposes in 1937.

A new ordinance authorizing the issuance and sale of these additional tax warrants is not necessary as the authority granted in the original ordinance has not been exhausted.

Citations:

Statute: Ill. Laws (1937), p. 278 (Poor Relief Taxes).

Ordinance: Coun. J. [1936-37], p. 2064.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of May 25, 1937. You state that the Chicago Relief Administration has requested the immediate issuance of ad-

ditional warrants in anticipation of taxes levied for the year 1936 for poor relief purposes. You state also that warrants amounting to about 38% of the tax levied for the year 1936 for poor relief purposes have been issued; that there is no outstanding indebtedness whatever relating to 1936 poor relief expense; and that the proceeds of the additional tax warrants, if issued, will be used to pay claims and indebtedness of the year 1937.

You ask our opinion "whether tax warrants may lawfully be issued in anticipation of the 1936 tax for the purpose of providing a fund from which claims and indebtedness incurred during the year 1937 may be paid."

If your query had been put to us a month or more ago it is doubtful if we could have answered it as we now do.

In the current session of the General Assembly Senate Bill No. 271, entitled:

"A bill for an Act concerning the use of poor relief taxes levied for the year 1936 or any year thereafter by certain governmental units and legalizing proceedings levying and appropriating such taxes."

was passed by both houses with an emergency clause and was approved and became a law May 13, 1937.

This bill was introduced by us at the suggestion of Mr. C—— of the firm of C—— and C—— and was prepared by Mr. C—— in collaboration with our Mr. G——. It was designed to permit the use of that part of the proceeds of taxes levied for poor relief purposes in one year, not required to pay expenditures incurred for such poor relief purposes in the year for which such taxes were levied, or to pay warrants issued in anticipation thereof for the relief and support of all poor and indigent persons lawfully resident therein for any year after the year for which such taxes shall have been levied.

So much of the said law pertinent to this inquiry is as follows:

"Section 1. Any governmental unit charged with the duty of administering relief to poor and indigent persons which levied taxes for the year 1936 or shall have levied taxes for any year thereafter for the relief and support of all poor and indigent persons lawfully resident therein may use that part of the proceeds of such taxes, not required to pay expenditures incurred for such poor relief purposes in the year for which such taxes shall have been levied or to pay warrants issued in anticipation thereof, for the relief and support of all poor and indigent persons lawfully resident therein for any year after the year for which such taxes shall have been levied.

"That such taxes so levied for the year 1936 or for any year thereafter may have exceeded the amount required to pay poor relief expenditures actually incurred in the year for which such taxes were or will be levied shall not constitute an objection to the validity of such taxes inasmuch as the amount of money actually needed for poor relief purposes for any year can only be estimated and cannot be realized during the year for which such taxes have been levied and could not have been

known at the time such taxes were levied and the need for money for poor relief purposes is an obligation continuing from year to year and will require the expenditure of money therefor in the year or years following such levy.

"The use of such proceeds of said poor relief taxes in paying poor relief expenditures incurred in the following year or years and the inclusion thereof in the appropriation ordinance for the following year or years by any such governmental unit is declared to have been within the intent of the statute authorizing the levy of such taxes and such appropriations are hereby legalized."

From the plain language of the section quoted above, we are of the opinion that the city of Chicago which is charged with the duty of administering relief to poor and indigent persons, and which levied taxes for the year 1936 for the relief of poor and indigent persons lawfully resident therein, and which was authorized by ordinance July 22, 1936 (*Coun. J.*, July 22, 1936, p. 2064), to issue and sell tax anticipation warrants against such tax levy, but did not issue or sell the full amount of tax anticipation warrants authorized by said ordinance, may now issue and sell additional warrants against the poor relief tax levy of 1936 in an amount which when added to the amount of warrants heretofore issued against such tax levy shall not exceed 75% of such tax levy, and may use the proceeds of the sale of such additional warrants to pay indebtedness incurred for poor relief purposes in 1937.

We do not believe that a new ordinance authorizing the issuance and sale of these additional tax warrants is necessary as the authority granted in the ordinance of July 22, 1936 has not been exhausted.

B. Administration

CITY RELIEF OFFICER AS STATE OFFICIAL

(No. 9232—*Commissioner of Relief—J.F.G.—July 15, 1936—3 pp.*)

The executive secretary of the Illinois Emergency Relief Commission may also serve as the Commissioner of Relief of Chicago, each governmental unit paying part of his salary, as there appears to be no conflict between the duties of these two offices and therefore are not incompatible.

Citations:

Statute: Pauper act, sec. 17a.

Cases: *People v. Green*, 58 NY 295 (1874).

People v. Haas, 145 Ill App 283 (1909).

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of July 14, 1936, in which you state that a question has been raised as to whether the executive secretary of the Illinois Emergency Relief Commission can also serve as the Commissioner of Relief of the city of Chicago, each governmental unit paying part of his salary.

It is a well-established rule of the common law that no person can hold two incompatible offices or positions in the public service. Incompatibility does not consist of the physical inability of one person to discharge the duties of the two offices nor in the acceptance of two salaries during the same period of service. Whether public offices are incompatible depends upon the nature of the duties to be performed. If the duties of the offices are such as to create a conflict of interest, they are incompatible. If the incumbent of one of the offices must account to the incumbent of the other office, or audit a report of the other, or if one is subject to rules and regulations or the supervision of the other, the offices are incompatible and cannot be held by one incumbent. (*People v. Green*, 58 NY 295, 304.) Offices are made incompatible by constitutional or statutory provisions although not incompatible at common law; that is to say, the Constitution or statutes may provide that certain officers may not hold any other public office. (*People v. Haas*, 145 Ill App 283.) There is no such constitutional or statutory provision affecting the office of Commissioner of Relief created by ordinance pursuant to authority of section 17a of the Pauper act, as amended.

The act creating the Illinois Emergency Relief Commission seems to vest every discretionary power relating to relief in the Commission itself. The office of executive secretary of the Commission is not provided for in that act. Undoubtedly that position was created by authority of the Illinois Emergency Relief Commission and pursuant to an appropriation by the State legislature. We have no means of determining what the duties of the executive secretary of the Illinois Emergency Relief Commission are. They are not defined in any act of the legislature and we assume that the powers and duties of the executive secretary were prescribed by the Illinois Emergency Relief Commission. If these duties are purely ministerial, as they should be, that is if the duties are to manage the organization set up to provide relief for those in destitute and in necessitous circumstances, there can be no conflict between those duties and the duties of the Commissioner of Relief of the city of Chicago. The executive secretary, so far as we know, is not in a position to pass judgment upon any act of the Commissioner of Relief of the City of Chicago.

Unless we are mistaken in the facts which we have assumed without the opportunity of a careful examination of the records of the Illinois Emergency Relief Commission, you may be assured that there is nothing in the present law or ordinance which prohibits the arrangement made regarding your appointment and the payment of your salary both by the Illinois Emergency Relief Commission and the city of Chicago.

* * * * *

RELIEF COMMISSIONER'S POWER TO CONTRACT FOR TRUCKING

(No. 9357—*Commissioner of Relief*—J.F.G.—December 8, 1936—1½ pp.)

The Commissioner of Relief has power to make contracts and purchases, including any contract for trucking, which is necessary for the administration of relief, provided there is an adequate appropriation for the particular purpose included in the contract entered into by him. No contract can, however, be let for a period beyond the fiscal year in which it was made, and when possible it should be let to the lowest responsible bidder from among at least three bidders.

The City Council will have to make an appropriation out of the City relief funds, for the purpose of trucking, unless there are sufficient unexpended State emergency relief funds to cover the amount of the trucking contract contemplated, for no appropriation has been made by the City Council for 1936 for the specific purpose of trucking.

Citation: Coun. J. (1936-37), p. 1958, sec. 609e.

CONTRACT AND INSPECTION OF RELIEF COAL BY DEPARTMENT OF PUBLIC WORKS

(No. 9316—*Commissioner of Relief*—J.F.G.—October 20, 1936—2 pp.)

The Department of Public Works may contract for coal for the Commissioner of Relief, if requested by him, the contract obligation to be against a relief appropriation, provided that the coal vendors will commit themselves for the delivery of additional quantities of coal at the prices obtained by the Commissioner of Public Works for purposes other than relief.

The Commissioner of Relief may arrange with the Commissioner of Public Works that coal inspectors employed by the Department of Public Works shall inspect coal delivered for relief purposes, and arrange to apportion the cost of inspection equitably between the Department of Public Works and the

Chicago Relief Administration. Payment of the cost of inspection however, will have to be made direct from relief funds to the inspectors so as to avoid transfer of funds from one department to another in violation of State law.

Citation: Cities and Villages act, art. VII, sec. 2a.

SUBPOENA OF CASE RECORD OF RELIEF CLIENT

(No. 9379—Commissioner of Relief—December 21, 1936—A.F.G.—2½ pp.)

The Commissioner of Relief must obey a *subpoena duces tecum* and produce a case record containing the family history of a family receiving public assistance, although the history was given in confidence, if the production of the record is ordered by a court upon a verified petition showing good and sufficient cause for the request.

A petition for a *subpoena duces tecum* requiring the production of a case record to discover if a pauper listed in his application for relief a debt upon which he subsequently brought suit, does not appear to be such a petition as shows good and sufficient cause for the issuance of the order. The Commissioner of Relief may answer the petition and submit to the discretion of the court the question of what part of the case record is material to the case on trial.

ADJUSTMENT OF RELIEF EMPLOYEES' SALARIES

(No. 9518—Commissioner of Relief—J.F.G.—May 14, 1937—1½ pp.)

By virtue of the ordinance of January 25, 1937, which fixes the salaries of certain temporary officers and employees of the Chicago Relief Administration at not to exceed certain specified amounts per month, the Commissioner of Relief, using his own discretion, may adjust the salaries of those temporary officers and employees within the maximum amounts specified by the ordinance.

Citations: Code '31: 649.

Coun. J. (1936-37), p. 3242.

SUBSCRIPTION TO HOSPITAL SERVICE PLAN BY RELIEF EMPLOYEES

(No. 9512—*Commissioner of Relief—A.F.G.—April 30, 1937—*
1½ pp.)

There appears to be no legal objection to employees of the Chicago Relief Administration becoming subscribers to the hospital service provided by the Hospital Service Corporation. The plan provides for payment of a subscription fee by the individual subscribing, or by deductions by the employer from the pay checks of the subscribing employees. The latter method should be avoided by the Commissioner of Relief as it is of doubtful legality and might require Council action. The City does not deduct from employees' salaries for union dues, subscriptions, or any other purpose except pensions for which provision has been made by statute.

CONTRACTS FOR HOSPITALIZATION OF RELIEF CLIENTS

(No. 9348—*Commissioner of Relief—A.F.G.—December 1, 1936—*
3½ pp.)

The Commissioner of Relief may enter into contracts for the hospitalization of relief clients after receiving bids from at least three bidders, or if he deems the taking of bids for this service not feasible he may waive that formality. It is a matter of policy whether he should follow the requirements of the Council of Social Agencies in the letting of these contracts, or whether he should permit any hospital qualified under the ordinance of the City to participate in this service.

Citations: Code '31: 2293-2315.

Coun. J. (1936-37) p. 1958, sec. 609d, 609e.

HOSPITAL INSURANCE FOR RELIEF CLIENTS

(No. 9494—*Commissioner of Relief—A.F.G.—April 17, 1937—*
2 pp.)

The furnishing of medical assistance and hospitalization in proper cases is as necessary to preserve life as is the furnish-

ing of food and shelter, and it is within the power of the Commissioner of Relief to furnish such aid, but as the appropriation for relief is for relief when needed, it does not appear that the Commissioner of Relief has power to anticipate the contingency of hospitalization of relief clients by purchasing insurance.

A plan whereby the subscriber upon payment of an annual fee or premium is entitled to receive either in one or several admissions in one or several hospitals a total of twenty-one days of hospital service during the year of his subscription is in the nature of hospital insurance.

TRANSPORTATION OF NON-RESIDENT RELIEF CLIENTS TO PLACE OF LEGAL RESIDENCE

(No. 9365—*Commissioner of Relief—A.F.G.—December 11, 1936*
—8½ pp.)

The Commissioner of Relief may authorize the payment of the transportation expenses of a non-resident relief client to his place of legal residence in another state or in a foreign country, if the Commissioner deems that the furnishing of transportation is the most effective way of providing relief and support to the client.

Citations:

Statute: Pauper act, sec. 1, 14a, 16, 17, 17a, 20.

Ordinance: Coun. J. (1936-37), p. 1958, sec. 609d.

Cases: Town of Kankakee v. McGrew, 178 Ill 74 (1899).

Town of Dorr v. Town of Seneca, 74 Ill 101 (1874).

Franklin County v. Henry County, 26 Ill App 193 (1877).

Other reference: 48 CJ 433.

Op. Ill. Att. Gen. (1931), p. 559.

Opinion No. 9269 (this volume, p. 205).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of October 29, 1936, in which you refer to our opinion letter of August 31, 1936,²⁰ regarding the care of persons

²⁰ Opinion No. 9269, p. 205.

by the Chicago Relief Administration who were residents of another town or county in the state of Illinois.

In our opinion of August 31, 1936, we advised you that under section 16 of the Pauper Act if you furnished relief to persons who twelve months prior to their becoming chargeable were lawful residents of some other city, county, or town in the State you would have a right of action against such city, county, or town to recover the amount of relief thus expended. This right of action is limited to expenses incurred in care of paupers who are residents of the State.

You now say:

"The question arises now as to whether the Chicago Relief Administration can legally pay transportation charges for persons who are residents of another state or of a foreign country, the intention being of course, to remove such persons from the relief rolls in the City of Chicago."

In considering this question we must look to various sections of the Pauper act, which is the basis of poor relief, as the same were amended in the recent special session.

Section 1 of that act provides that every poor person who shall be unable to earn a livelihood on account of idiocy, lunacy, or other unavoidable cause shall be supported by certain specified relatives in order as stated; sections 2 to 12, inclusive, provide the procedure to compel support by the aforesaid relatives.

Section 14a makes it the duty of cities, villages, and incorporated towns of more than 500,000 inhabitants to relieve and support all poor and indigent persons lawfully resident therein, except as this act otherwise provides.

Section 16 is as follows:

"Sec. 16. If any person shall become chargeable as a pauper in any city, village or incorporated town having a population of more than 500,000 inhabitants or in any county or town, who did not reside therein at the commencement of twelve months and immediately preceding his becoming so chargeable, but did at that time reside in some other city, village or incorporated town in this state charged with the relief and support of poor and indigent persons or some other county or town in this state, it shall be the duty of the municipal, county or town clerk, as the case may be, to send written notice by mail or otherwise, to the clerk of such other city, village or incorporated town in which such pauper so resided, or to the county clerk of the county in which the pauper so resided, or if he then resided in a town supporting its own poor, to the town clerk of such town, requesting the proper authorities of such city, village or incorporated town, county or town, as the case may be, to remove said pauper forthwith, and to pay the expenses accrued or to accrue in taking care of the same; and such city, village or incorporated town, county or town, as the case may be, where such pauper resided at the commencement of the twelve months immediately

preceding such person becoming chargeable as a pauper, shall pay to the city, village or incorporated town, county or town so taking care of such pauper, all reasonable charges for the same, and such amount may be recovered by suit in any court of competent jurisdiction."

Section 17 reads as follows:

"Sec. 17. The term 'residence,' mentioned in this act, shall be taken and considered to mean the actual residence of the party, or the place where he was employed, or in case he was in no employment, then it shall be considered and held to be the place where he made it his home."

Section 17a provides for the appointment of an Overseer of the Poor or like officer and further provides that:

"* * * Such overseer or officer shall have the care and oversight of such poor and indigent persons as are not supported by their relatives or at the county poor farm and shall see that they are suitably relieved, supported and employed, subject to such restrictions and regulations as may be prescribed by the city council or board of trustees, as the case may be. * * *"

Section 20 is as follows:

"Sec. 20. The overseers of the poor shall have the care and oversight of all such persons in their municipality, town or precinct as are unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, and as are not supported by their relatives or at the county poor house, and shall see that they are suitably relieved, supported and employed, subject to such restrictions and regulations as may be prescribed by the city council or board of trustees, board of town auditors or the county board, as the case may be."

We think also in studying the pauper laws, we should consider the views expressed in this and other jurisdictions on the humane purpose underlying these laws.

In some jurisdictions, it is held that statutes providing for the maintenance of paupers being enacted in the interests of humanity must be liberally construed to effectuate the benevolent policy of the legislation. 48 *Corpus Juris* 433.

This seems to be the view the courts of Illinois hold in reference to pauper laws. In one case our Appellate Court said:

"A poor person, whether sane or insane, has a right to live, and must not be permitted to die from want or exposure. Such is the humane intent of the law. The county where he resides when he falls sick, or becomes insane, or a pauper even though his residence there is but temporary, is liable for his support primarily, and until it is able to show the county to which such poor person is properly and legally chargeable under the statute, and is enabled to impose the burden of support upon such latter county." *Franklin County v. Henry County*, 26 Ill App 193, 196.

In another case the Supreme Court of this State had this to say:

"The necessities of the unfortunate class designed to be relieved by the law do not, however, admit of delay. Pain and suffering must be relieved; food, fuel, clothing and shelter must be furnished to those in need; the dead must be buried. Prompt relief is imperative, and the overseer of the poor may not await the action of the State's attorney and the termination of proceedings in court, but, as the representative of the town, must care for those who are so unfortunate as to be entitled to assistance from the public." (*Town of Kankakee v. McGrew*, 178 Ill 74, 84.)

It will be observed that said section 14a makes it mandatory upon the city of Chicago to "relieve and support all poor and indigent persons lawfully resident therein except as herein otherwise provided."

The provision of said section 14a was in our opinion intended by the legislature to provide support for all indigent persons living within the City. This section read in connection with section 17, quoted above, makes it imperative upon the City to support all indigent persons having residence as defined in said section 17 within the City.

Section 17 in the present act is the same as section 15 of the act of 1845 and was construed by the Supreme Court in the following language:

"The fifteenth section seems to have provided for three different conditions of residence. The first is where the pauper has a fixed, well-known permanent place of abode. The second is where such person has no such abode, but has been employed by some one else; and the third is where the person has no fixed permanent place of abode nor has had any employment as specified, when the place the party made his or her home is regarded the place of residence, and the place where chargeable." (*Town of Dorr v. Town of Seneca*, 74 Ill 101.)

The provision of section 16 with reference to residence for twelve months immediately preceding was not intended to deny indigent persons support until they had lived within the City for the period of twelve months. The purpose of section 16 is to fix the obligation for support upon the proper township or county as the case may be. Any other construction would defeat the humane intent of the act.

This view of these provisions coincides with the opinion of the Attorney General of Illinois, *Opinions*, 1931, page 559.

Section 1 of the Pauper act provides that every person who shall be unable to earn a livelihood on account of idiocy, lunacy, or other unavoidable cause shall be supported by certain specified relatives; but section 14a and section 20 of the same act provide that Overseers of the Poor shall have the care and custody of all such persons in their towns as are unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, and as are not supported by their relatives or at the county poor house, and shall see they are suitably

relieved subject to such restrictions and regulations as may be prescribed by the town or city. The Overseer of the Poor cannot refuse to fulfill the duties thus cast upon him upon the ground that the unfortunate person entitled to relief has relatives who are liable, under the first section of the act, to provide and care for them, or that some other county, town or city is primarily liable for their care and support. The exigencies of the case do not admit of delay.

The express provisions of section 14a and 20 make it the duty of such Overseer to relieve the wants of those who fall within the legal denomination of paupers and "as are not supported by their relatives or at the county poor house." (*Town of Kankakee v. McGrew*, 178 Ill 74, 84.)

We return to your original question whether the Commissioner of Relief may legally pay transportation charges to persons on the relief rolls who are residents of another state or a foreign county.

In both sections 14a and 20 granting power to the Overseer of the Poor to relieve paupers, the powers there granted are "subject to such restrictions and regulations as may be prescribed by the city council or board of trustees as the case may be."

In the ordinance of the city of Chicago creating the office of Commissioner of Relief, adopted July 1, 1936, *Council Journal*, July 1, 1936, page 1958, is found section 609d which defines the powers and duties of the Commissioner of Relief and reads as follows:

"609d. *Powers and duties.*) The Commissioner of Relief shall have the care and oversight of such poor and indigent persons as are not supported by their relatives or by Cook County and shall see that they are suitably relieved, supported and employed subject to such restrictions and regulations as may be prescribed by the City Council. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the Commissioner of Relief. It shall be the duty of the Commissioner of Relief to carefully investigate all applications for relief and to grant relief only in cases of actual need and to such poor and indigent persons as are legally entitled to relief."

Having found that the Commissioner of Relief may furnish relief and support to a non-resident of the State who became a pauper while resident herein, and under the provisions of section 609d of the City ordinance quoted above such relief may be furnished by "distributing funds or supplies or by any other means deemed desirable by the Commissioner of Relief," we are of the opinion that if in the judgment of the Commissioner of Relief the furnishing of transportation to his place of legal settlement to a non-resident relief client is the most effective way of providing relief and support to such a client, he may legally authorize the payment of such transportation.

CITY PAUPERS FORMERLY RESIDENTS OF OTHER PLACES

(No. 9269—*Commissioner of Relief—A.F.G.—August 31, 1936*
—2½ pp.)

A pauper charge of the City who was a resident of some other Illinois city, village, town, or county twelve months before he became a City charge, should be cared for by the place of his former residence upon receiving reasonable notice from the City. If compliance with the notice is refused, an action will lie on behalf of the City against the city, village, town or county of such former residence to recover the costs and charges expended for the pauper.

Citations:

Statute: Pauper act, sec. 16.

Cases: Town of Fox v. Town of Kendall, 97 Ill 72 (1880).

Richland County v. Decker Township, 275 Ill App 220 (1934).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of August 26, 1936, asking advice concerning the proper steps which should be taken in order that the relief commissioner of the city of Chicago might conform with section 16 of the Pauper act which is as follows:

"Sec. 16. If any person shall become chargeable as a pauper in any city, village or incorporated town having a population of more than 500,000 inhabitants or in any county or town, who did not reside therein at the commencement of twelve months immediately preceding his becoming so chargeable, but did at that time reside in some other city, village or incorporated town in this state charged with the relief and support of poor and indigent persons or some other county or town in this state, it shall be the duty of the municipal, county or town clerk, as the case may be, to send written notice by mail or otherwise, to the clerk of such other city, village or incorporated town in which such pauper so resided, or to the county clerk of the county in which the pauper so resided, or if he then resided in a town supporting its own poor, to the town clerk of such town, requesting the proper authorities of such city, village or incorporated town, county or town, as the case may be, to remove said pauper forthwith, and to pay the expenses accrued or to accrue in taking care of the same; and such city, village or incorporated town, county or town, as the case may be, where such pauper resided at the commencement of the twelve months immediately preceding such person becoming chargeable as a pauper, shall pay to the city, village or incorporated town, county or town so taking care of

such pauper, all reasonable charges for the same, and such amount may be recovered by suit in any court of competent jurisdiction."

This section as it applies to your office provides in substance that if any person shall become chargeable as a pauper in the city of Chicago, who was at the commencement of twelve months before he became a City charge a resident of some other city, village, town, or county charged with the relief and support of poor and indigent persons, it shall be the duty of the last named city, village, town, or county to take charge of the pauper on receiving notice specified in the act, and on refusal, an action shall lie against the city, village, town, or county on behalf of the city where such person became chargeable to recover the costs and charges expended for such pauper. *Town of Fox v. Town of Kendall*, 97 Ill. 72).

It is your duty when you discover such cases to direct the City Clerk to notify the clerk of the town or county where such pauper resided to remove said pauper and to pay the expenses accrued or to accrue in taking care of the same. On refusal you should direct the Law department of the City to begin action to recover such charges in some court of competent jurisdiction.

This section limits the right of action to expenses incurred in care of paupers who are residents of the State. (*Richland County v. Decker Township*, 275 Ill App 220. The provision as to notice has been construed to mean reasonable notice. (*Town of Fox v. Town of Kendall*, *supra*.)

JURISDICTION OF JUVENILE COURT OVER DEPENDENT CHILDREN

(No. 9373—Commissioner of Relief—A.F.G.—December 15, 1936
—2½ pp.)

Any male child under the age of seventeen years, or any female child under the age of eighteen years, who is destitute, homeless, abandoned, dependent on the public for support, or does not have proper parental care or guardianship is subject to the care, guardianship, and control of the Juvenile Court.

If the Commissioner of Relief feels that the best interests of such children who are being cared for by the Chicago Relief Administration would be served by bringing them within the jurisdiction of the Juvenile Court, he may have them brought within the control of that court.

Citation: Juvenile Court act, sec. 1, 4.

OPINION OF FOREGOING SYNOPSIS

On December 9, 1936, you wrote as follows:

"The question of responsibility that can be assumed by the Chicago Relief Administration with regard to minors both male and female who come to the city of Chicago from other towns in the state and from other states has been raised.

"We are now caring for approximately twenty such individuals, through a type of foster home care. I am wondering if under the interpretation of the law, the Chicago Relief Administration can assume such responsibility or whether this becomes a matter for the attention of the Juvenile Court of Cook County."

You fail to state the ages of the individuals to whom your letter refers but speak of them as "minors both male and female." If the individuals referred to are males over the age of seventeen years, or females over the age of eighteen years, they are not subject to the provisions of the Juvenile Court act.

Section 1 of the Juvenile Court act provides in part as follows:

"Section 1. That all persons under the age of twenty-one (21) years, shall, for the purpose of this act only, be considered wards of this State and their persons shall be subject to the care, guardianship and control of the court as hereinafter provided.

"For the purpose of this act, the words 'dependent child' and 'neglected child' shall mean any male child who while under the age of seventeen years or any female child who while under the age of eighteen years, for any reason, is destitute, homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship * * *."

It would appear to be clear from a reading of this section of the statute that any male child under the age of seventeen years or any female child under the age of eighteen years who, for any reason, is destitute, *homeless*, abandoned, or *dependent on the public for support*, or has not *proper* parental care or guardianship is a dependent child of this State, and that such children are wards of the State and subject to the care, guardianship, and control of the court.

If any of the individuals referred to are within the age limits fixed in the statute, and you feel that their best interests would be served by bringing them within the jurisdiction of the Juvenile Court, you may do so by filing or having any reputable person who is a resident of the County file with the clerk of that court the petition provided in section 4 of the Juvenile Court act.

* * * * *

EMPLOYMENT OF RELIEF RECIPIENTS ON ROADS

(No. 9666—*Commissioner of Relief—J.F.G.—October 23, 1937*
2½ pp.)

The Commissioner of Relief, as overseer of the poor within Chicago, is required by the Pauper act to submit statements monthly to the Superintendent of Streets containing a list of all employables receiving relief, and the Superintendent of Streets is authorized to give such persons employment on roads under his jurisdiction, the period of employment each month to be "as nearly practicable" of such length as to allow each recipient of relief so employed to earn his monthly relief allowance.

The Chicago Relief Administration may legally comply with this provision of the Pauper act under a plan whereby each employable receiving relief is to work on the streets of the City the same length of time, that is one week, notwithstanding that the monthly relief budget of each such person varies, since this variance from strict equality of treatment of persons on relief is permissible under the wording of the statute.

Those relief employables with experience which will qualify them for supervisory work and timekeeping may be assigned to such duties, those duties being incident to, and therefore properly considered as part of the work on roads.

Citation: IRS '37, 107: 20a.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 20, 1937, outlining plan to the Commissioner of Public Works, who is Acting Commissioner of Streets and Electricity of the city of Chicago, for the employment of persons on relief rolls in work on roads under his jurisdiction.

Section 20a of "An Act to revise the law in relation to paupers," approved March 23, 1874, as amended by an act approved July 7, 1937 (Illinois Revised Statutes, 1937, chap. 107, par. 20a) imposes an obligation upon the Commissioner of Relief of Chicago, as Overseer of the Poor within the City, to submit statements monthly to the Superintendent of Streets of a list of all employables receiving relief, and the Superintendent of Streets is authorized to give employment to persons on such list to work on roads under his jurisdiction. It is provided further that the period of employment for each recipient during each month shall "as nearly as may be practicable" be of such length as to allow him to earn his monthly relief allowance and that no compensation other than

such relief allowance shall be paid to such recipient for the performance of such work; that no further relief shall be furnished any employable who refuses to accept employment as provided in the Act.

The plan outlined is to assign every employable, able-bodied male to work one week out of every month in consideration of relief granted by the Chicago Relief Administration. The monthly relief budget of each person so assigned varies while the length of the period of employment required by your plan is the same for each person assigned. This variance from strict equality of treatment of persons on relief is permissible under the statute which requires the period of employment for each recipient during each month to be as nearly as may be practicable to allow him to earn his monthly relief budget allowance. A reasonable discretion is permitted under the statute for the determination of the amount of work which may be required of the recipient of relief.

The plan also provides for the designation of men on the list of employables with work experience qualifying them for supervisory work and timekeeping who will be assigned to such duties. While, strictly speaking, the statute designates that recipients of relief may be given employment for work on roads, we are of the opinion that the supervision of those employed on such work and the checking of the time of those so employed are incidents to and properly may be considered as part of the work on roads.

* * * * *

CHAPTER V

LOCAL IMPROVEMENTS

A. Construction

NORTH STATE STREET BRIDGE AND VIADUCT IMPROVEMENT

(No. 9386—*Commissioner of Public Works—J.J.S.—December 31, 1936—4½ pp.*)

The City has the right to change the width of the viaduct in the North State Street bridge and viaduct improvement from that contained in the original estimate upon which the amount of the bonds for the improvement was predicated, as neither the ordinance providing for the bond issue nor the ordinance providing for a referendum vote on the bond issue fixed the size or dimensions of the bridge and the viaduct approach.

The City has no right to require a railroad company to furnish free of cost to the City that part of its lands necessary to permit the construction of the State Street bridge and viaduct. The land may be acquired by condemnation.

The Illinois Commerce Commission has the power after a hearing to apportion the cost of the north approach to the State Street bridge over land belonging to a railroad company between the City and the railroad company.

Citations:

Statute: SH '35, Ill 2/3: 62.

Ordinances: Coun. J. (1930-31), p. 3729 (North State street bond fund); p. 3743 (North State street bridge bond issue referendum).

Case: Chicago v. Illinois Commerce Commission, 356 Ill 501 (1934).

OPINION OF FOREGOING SYNOPSIS

In your letter to the Corporation Counsel relative to the construction of the North State Street bridge, the cost of which is to be paid for

from the North State Street bond fund authorized by ordinance September 22, 1930, and approved by election November 4, 1930, you submit three propositions on which you desire to be advised:

"1. As to the legal right of the City to change the width of the viaduct constituting this improvement, from that contained in the original estimate, upon which the ordinance authorizing the issuance of bonds was predicated.

"2. As to the legal right of the City to demand that the Chicago and North Western R. R. Co., furnish that part of their lands necessary to permit the construction of the State Street bridge and viaduct, free of cost to the city.

"3. As to the legal right of the City to demand that the Chicago and Northwestern R. R. Co. contribute all or any part of the cost of the construction of the part of the viaduct included in this improvement located over their lands."

From a prior letter sent to us by you it appears that a petition for the widening of North State street to 115 feet was filed September 25, 1930, and the Commissioner's report and assessment roll on November 19, 1930. It likewise appears that the ordinance providing for the construction of the subway was passed December 15, 1930, the petition filed December 16, 1930, and the Commissioner's report and assessment roll filed January 20, 1931.

You state that the original project contemplated a bridge 108 feet wide and a viaduct of the width of 115 feet which was the width of North State street provided for in the widening ordinance.

You further state that the plans for a 108 foot wide bridge and 115 foot wide viaduct approach were predicated on the construction of the subway in and along North State street.

In our answer to your first question we state that we find nothing, either in the ordinance providing for the bond issue or for the referendum vote, which fixes the size or dimensions of the bridge or the viaduct approach. The ordinance providing for the issuance of bonds in the amount of \$3,500,000 recites that it is for the purpose of providing funds for the payment of the cost of construction of a bridge in North State street and approaches thereto and including the acquisition of necessary land in connection therewith. (*Coun. J.*, September 22, 1930, page 3729.) It contains no description of the proposed bridge or approaches. It is a mere bond ordinance providing for the issuance of bonds to pay the cost of a bridge, approaches and necessary lands. It was passed September 22, 1930, and the referendum on it was approved November 4, 1930.

The referendum ordinance was likewise passed September 22, 1930. (*Coun. J.*, p. 3743). It provides for the calling of a special election for the purpose of submitting to a referendum vote the question of approval of the North State street bridge bond issue and other bond issues. It does

not describe the bridge. The proposition placed on the ballot, and voted on, submitted to the voters only one question, namely, whether bonds to the amount of \$3,500,000 shall be issued by the City Council of the city of Chicago to pay the cost of the construction of a bridge in North State street, the approaches and the acquisition of the necessary land.

It is our opinion that no particular type, kind, or dimensions of a bridge having been described in ordinance authorizing the bonds or the proposition submitted to the people, the City is not limited to a type of bridge its engineers had in mind in making up an estimate of cost upon which the amount of bonds was predicated. The City has a right to build the type and kind of a bridge its judgment now determines.

In your second question you submit the proposition as to whether or not the City has the legal right to require the railroad company to donate part of its land without charge to the City for the construction of the bridge and viaduct. The City has no legal right to force the company to turn over land necessary for the bridge and viaduct. The land may be acquired by the City by condemnation.

In answering your third question, namely, as to the legal right of the City to require the railroad company to pay all or part of the cost of the bridge approach we call your attention to section 58 of the Public Utilities act. (Smith-Hurd, 1935, page 2548.) It provides that the Illinois Commerce Commission shall have the power to require the reconstruction, alteration, relocation, or improvement of any crossing, including the necessary highway approaches thereto of any railroad across any highway whether such crossing be at grade or by overhead structure or by subway, and may apportion the cost of such change or improvement between the railroad company and the municipality affected.

In the case of *City of Chicago v. Illinois Commerce Commission*, 356 Ill 501, the court in passing on the powers vested in the Commission by section 58 said at page 508:

"The commission's jurisdiction over all phases of grade crossing regulation has been recognized as plenary and exclusive * * *."

The court said again at page 510:

"* * * Neither municipal franchise ordinances which have been accepted and acted on by grantee utility companies, nor municipal regulation ordinances passed under legislative authority, can stand in the way of the lawful exercise, by the Commerce Commission, of the regulatory police powers conferred upon it by the General Assembly."

Under the broad grant of powers to the Commission it is our opinion that the Commission has power after hearing to apportion the cost of the north approach to the State Street bridge between the City and the company.

PAYMENT OF ADDITIONAL WORK ON SOUTH ASHLAND AVENUE BRIDGE

(No. 9498—*Commissioner of Public Works—A.A.S.—April 20, 1937—1 p.*)

The City is legally obliged to pay for certain additional work in connection with the contract for the South Ashland Avenue bridge and approaches, but it will be necessary to obtain the approval of the Public Works Administration on the change of plans before any vouchers are passed for payment out of the South Ashland Avenue bridge construction account. As gas tax funds are being used to pay for the construction of the bridge, it also will be necessary to obtain the consent of the Division of Highways of the State Department of Public Works and Buildings.

B. Special Assessments

LIABILITY FOR SPECIAL ASSESSMENT BONDS AND PUBLIC BENEFIT VOUCHERS

(No. 9496—*A.A.S.—April 19, 1937—3½ pp.*)

Special assessment bonds and vouchers are not a general liability of the City but are obligations payable out of assessments when collected by the City.

In many of the improvements authorized to be undertaken by the City and payable by special assessment, the City is taxed its proportionate share for public benefits. These public benefits are payable out of the general funds of the City and are, therefore, considered a general liability of the City.

Citations:

Statute: SH '35, 24: 777, 799.

Case: Chicago v. Breda, 218 Ill 528 (1905).

OPINION OF FOREGOING SYNOPSIS

Your letter of March 20, 1937, has been referred to the undersigned for reply. * * * We have spent some time in research of the law governing the subject on which you wrote us.

In your letter you state that the annual report of the City Comptroller of Chicago for the fiscal year ending December 31, 1935, showed a total of \$31,133,327.00 in deferred liabilities. Included in this total were also deferred vouchers and special assessment improvement bonds. Your query is whether or not special assessment bonds and vouchers are general obligations of the City or special obligations of one or more assessment districts. We have analyzed the report of the Comptroller referred to and beg to advise that the total set out above included special assessment bonds and vouchers, as well as deferred public benefit vouchers.

Let us state at the outset that special assessment bonds and vouchers are not a general liability of the city of Chicago, but on the contrary are obligations payable out of assessments when collected by the city of Chicago.

We refer to section 73 of the Local Improvement act, paragraph 777, chapter 24 of Smith and Hurd's Revised Statutes of 1935, which provides as follows:

"No person or persons or bodies corporate, taking any contracts from the City, village or town, and agreeing to be paid out of special assessments or special taxes, shall have any claim or lien upon the city, village or town in any event, except from the collection of special assessments or special taxes made or to be made for the work contracted for, but the municipality shall cause collections and payments to be made with all reasonable diligence. And in such case, if it shall appear that such assessment or tax cannot be levied nor collected, the municipality shall not, nevertheless, be in any way liable to such contractor or contractors in case of failure to collect the same, but shall, so far as it can legally do so, with all reasonable diligence, cause a valid assessment or assessments, special taxes, to be levied and collected to defray the cost of said work until all contractors shall be fully paid, and any contractor shall be entitled to summary relief of mandamus or injunction to enforce the provisions hereof.

"The city treasurer shall keep a separate account with each special assessment warrant number, and with the money received thereunder."

Section 90 of the Local Improvement act, paragraph 799, chapter 24, provides as follows:

"No person or persons accepting the vouchers or bonds as provided herein shall have any claim or lien upon the city, town or village in any event for the payment of such vouchers or bonds or the interest thereon, except from the collections of the assessment against which said vouchers or bonds are issued, but the municipality shall not, nevertheless, be in any way liable to the holders of said vouchers or bonds in case of failure to collect the same, but shall, with all reasonable diligence, so far as it can legally do so, cause a valid special assessment or assessments,

special tax or taxes as the case may be, to be levied and collected, to pay said bonds and vouchers, until all bonds and vouchers shall be fully paid. Any holder of vouchers or bonds, or their assigns, shall be entitled to summary relief by way of mandamus or injunction to enforce the provisions hereof."

From the language of these two sections above quoted, it is apparent that special assessment bonds and vouchers are not general liabilities of the city of Chicago.

The Supreme Court of the state of Illinois has passed upon this question in the case of *City of Chicago v. Brede*, 218 Ill 528.

In many of the improvements authorized to be undertaken by the city of Chicago, and payable by special assessment, the city of Chicago is taxed its proportionate share for public benefits. These public benefits are payable out of the general funds of the city of Chicago and are, therefore, considered a general liability of the city of Chicago.

* * * * *

COLLECTION OF SPECIAL ASSESSMENT VOUCHERS

(No. 9507—A.A.S.—April 28, 1937—2 pp.)

The City can take no legal action against the Municipal Tuberculosis Sanitarium, the Board of Education, and some of the park districts to enforce the collection of special assessment vouchers issued by the City for assessments confirmed against these agencies by the sale of property. However the holders of the vouchers or bonds are entitled to relief by mandamus or injunction against these agencies.

With regard to special assessment vouchers issued by the City for assessments confirmed against these agencies, the City can incur no personal liability for failure to do more than it has already done to collect the assessments, as it has been diligent in its efforts.

Citations: Local Improvements act (1897), sec. 90.
Ill. Laws (1901), p. 101.

COLLECTION OF DELINQUENT ASSESSMENTS WITHDRAWN FROM SALE

(No. 9440—City Collector—A.A.S.—February 27, 1937—3½ pp.)

The City Collector may not restore to his books for collection the installments of a special assessment warrant either when an installment was returned by the City Collector to the County Collector as delinquent but withdrawn from sale or collection, or when the certificate of sale was cancelled and the records of the County Clerk marked "Sale in Error."

The assessment installment should be returned to the County Clerk and can be redeemed at his office or at the office of the City Comptroller. The installments are an open item on the books of the County Collector until they are again advertised and sold. They may be paid to the County Collector until such a time as another sale is had.

A suit pending against the City for damages to the property assessed because of the failure of the City to complete the improvement for which the assessment was levied has no bearing on the collection of the assessment.

Citations:

Statute: SH '35, 24: 772.

Cases: Lawrence v. People, 188 Ill 407 (1900).

People v. Raymond, 248 Ill 124 (1911).

RECOVERY OF SPECIAL ASSESSMENT

(No. 9333—City Comptroller—J.J.S.—November 16, 1936—2½ pp.)

When a special assessment is voluntarily paid, whether through error of fact or judgment, no recovery can be had, regardless of the fact that all bonds issued against that installment have been paid, or that a decree has been entered removing the decree of sale for failure to pay the installment as a cloud on the title to the property.

Citation: American Can Co. v. Gill, 364 Ill 254 (1936).

PRO RATA PAYMENT OF SPECIAL ASSESSMENT VOUCHERS

(No. 9523—City Comptroller—A.A.S.—May 18, 1937—1½ pp.)

The Comptroller can pay pro rata special assessment vouchers issued on the first installment of the assessment only the amount which was paid on the first installment. If a portion of the amount received in payment of special assessments was paid on the second or subsequent installments, it cannot be used in payment of vouchers issued against the first installment of the assessments.

The City Comptroller, under the law, is not permitted to use funds from supplemental warrants to pay vouchers issued against any installment of the original warrant.

INTEREST ON SUPPLEMENTAL ASSESSMENT

(No. 9492—President, Board of Local Improvements—A.A.S.—April 15, 1937—2½ pp.)

The interest on a supplemental special assessment should begin to run from the date of its confirmation and not from the date of the issuance of the first voucher in the original assessment.

Citation: SH '35, 24: 745, 761.

EFFECT OF UNPAID TAXES AND SPECIAL ASSESSMENTS ON AN EASEMENT

(No. 9455—President, Board of Local Improvements—A.A.S.—March 12, 1937—2 pp.)

The owner of a parcel of land may grant to the City a good and sufficient easement for the construction of sewers notwithstanding that the taxes and special assessments due on the property have not been paid. However, to strengthen the City's

position with regard to the payment of the unpaid taxes and special assessments, the owner of the property should include in the easement a clause in which he assumes the burden of paying all the back taxes and special assessments and all taxes and special assessments which may be levied on the property in the future.

CHAPTER VI

PUBLIC WAYS

A. Dedication and Vacation

APPROVAL OF PLAT DEDICATING MORTGAGED LAND

(No. 9686—*Superintendent of Maps and Plats*—A.A.S.—November 3, 1937—1½ pp.)

The Examiner of Subdivisions may approve a plat of dedication of land against which there is a mortgage, notwithstanding that the trustee has no power under the trust deed to release the lien so created on the property. Such an approval of the plat will constitute a statutory dedication of the property subject only to the rights of the mortgagee.

UNDEDICATED PROPERTY USED AS STREET

(No. 9551—*Alderman, 41st Ward*—C.N.—July 7, 1937—3½ pp.)

The title to a piece of unimproved property which for fifteen years has been used as a street, although not dedicated, does not automatically pass to the City by prescription unless the use of the street is adverse, open, notorious, exclusive, continuous, and uninterrupted.

Citations:

Statute: ISBS '35, 121: 153.

Cases: Doss v. Bunyan, 262 Ill 101 (1914).

Koch v. Mraz, 334 Ill 67 (1929).

Lee v. Dickman, 316 Ill 529 (1925).

Moulton v. DeGuibert, 312 Ill 567 (1924).

City of Springfield v. Springfield Consolidated Ry., 295 Ill 234 (1920).

OPINION OF FOREGOING SYNOPSIS

We have your letter of June 28, 1937, in which you say:

"I should very much appreciate an opinion from you as to whether or not property used as a street (unimproved) for a period of fifteen years although not dedicated, becomes by virtue of such use for such a period, City property. In other words does title automatically pass to the City as a result of the use of this property for street purposes?

"The street I have in mind is N. Mobile Avenue, north of Gunnison Street, in my Ward."

We have examined the records of the Bureau of Maps and Plats, the Recorder's office and the office of the County Collector. From the description given by you we presume the property referred to is that north of Gunnison street between Nagle avenue and Mobile avenue in the 41st Ward. This is part of the property legally described as

"The S 5 acres of the W 20 acres of the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$, Section 8-40-13."

The result of our search makes it appear that this is part of private property which on July 31, 1936, was deeded by quit claim deed from George J. Goumas to John Chase. There is no indication in the public records that the property you refer to is being used as a street. When and if the acreage is subdivided the east 33 feet will become a regular City street. As to the west 33 feet or any additional part now being used as a street, since no question of dedication or grant enters into this discussion, the only way in which this property could be claimed by the City would be by prescription.

Section 139, paragraph 153, article 8, chapter 121 (page 2748), Illinois State Bar Statutes, 1935, reads as follows:

"(Certain roads declared public highways.) All roads in this State which have been laid out in pursuance of any law of the State, or of the Territory of Illinois, or which have been established by dedication or used by the public as highways for fifteen (15) years, and which have not been vacated in pursuance of law, are hereby declared to be public highways."

Originally the section, hereinabove quoted, in somewhat different form required twenty years of user to create a highway by prescription, but in 1887 the statute as revised and amended changed the period of user to fifteen years and the law has been substantially the same ever since. However, though the time period was changed as pointed out in *Doss v. Bunyan*, 262 Ill 101 (1914), this did not change the character of the use required and it was and is still necessary that such use be adverse, open and notorious, exclusive, continuous and uninterrupted.

In the case of *Koch v. Mraz*, 334 Ill 67 (1929), the court held that the use of one who finds a way open and uses it because it seems to be intended for such use does not of itself show that this use is exercised as a matter of right or adverse to the rights of the true owner, and such

use will not establish a prescriptive right, no matter how frequent or how long continued.

In *Lee v. Dickman*, 316 Ill 529, (1925) the court stated that the test in determining whether a road has become a highway is whether or not the public generally has the free and unrestricted right, in common, to use the road, and where it appears to have been openly and notoriously used as an open public highway in common by all people for the statutory period it will be considered a public highway.

In *Moulton v. De Guibert*, 312 Ill 567, (1924) it was held that use by the public to establish a highway must be under a claim of right to the use, not by mere acquiescence of the owner.

In *City of Springfield v. Springfield Consolidated Railway Co.*, 295 Ill 234 (1920), it was pointed out that to create a road by prescription the user must be adverse to owner under a claim or right, continuous, uninterrupted, and with the knowledge of the owner yet without his consent, and there must be something more than mere travel over unenclosed lands.

In the instance at hand, while the property is privately owned, tax records reveal that in recent years the owner has made no effort to remove tax liens and penalties for past due taxes have accumulated. We have no means of knowing from your letter how essential the use of the property as a road may be to the needs of the City. It is apparant, however, from the hereinabove citations that title to the property does not pass automatically to the City because various essential elements of acquirement of title by prescription are absent.

APPROVAL OF PLAT OF RESUBDIVISION—REMOVAL OF STREET ENCROACHMENT

(No. 9349—*Commissioner of Public Works—A.A.S. and E.H.—*
December 1, 1936—8 pp.)

The Superintendent of Maps is not required to approve the plat of a subdivision which is not in statutory form in that it does not provide for alleys, but it would not be an abuse of his discretionary powers if he were to approve it.

The City at this time would probably be estopped from forcing a railroad to remove retaining walls enclosing part of a street not vacated by the Track Elevation ordinance of May 28, 1913, as the Commissioner of Public Works approved the railroad's plans as required by the ordinance, although his approval was

given in error, and the railroad has made valuable improvements on the property.

Citations:

Statute: SH '35, 24: 62, 73, 134; 109: 1.

Ordinances: Code '31: 198, 736, 737.

Coun. J. (1913-14), p. 645 (Track elevation ordinance).

Cases: Chicago v. Union Stock Yards and Transit Co., 164 Ill 224 (1896).

Illinois Steel Co. v. Chicago, 229 Ill 303 (1907).

People v. City of Rock Island, 215 Ill 488 (1905).

Advance Elevator Co. v. Eddy, 23 Ill App 352 (1887).

Other reference: Wood, Nuisances, vol. 1, p. 302.

OPINION OF FOREGOING SYNOPSIS

Your letter of February 14, 1936, in which you ask for an opinion of the Corporation Counsel as to the advisability of approving four plats submitted to the Superintendent of Maps by the Chicago and Western Indiana Railroad company, has been referred to the undersigned for reply.

We submit the following opinion relative to Plat No. 1. The question raised by the other plats involve such controversial matters as will require further study and investigation, and for this reason an opinion as to them will be forwarded to you at a later day.

Section 5 of article 10 of the Cities and Villages act (Par. 134, chap. 24 of Smith and Hurd's Revised Statutes of 1935) provides:

"The city council or board of trustees shall have power to provide, by ordinance, that any map, plat, or subdivision of any block, lot, sub-lot, or part thereof, or of any piece or parcel of land, shall be submitted to the city council or board of trustees, or to some officer to be designated by such council or board of trustees, for their or his approval; and in such cases no such map, plat, or subdivision shall be entitled to record in the proper County, or have any validity until it shall have been so approved."

Section 1 of chapter 109 of Smith and Hurd's Revised Statutes provides in part as follows:

"Whenever the owners of lands shall wish to subdivide the same into two or more parts for the purpose of laying out a town, or making any addition to any city, village or town, or of resubdividing any lots or blocks therein, he shall cause the same to be surveyed and a plat thereof to be made by the County Surveyor or some other competent surveyor, which plat shall particularly describe and set forth all the streets, alleys, common or public grounds, and all the in and out lots, or fractional lots or blocks within, adjoining or adjacent to the land so divided, giving the names, width, courses and extent of all such streets and alleys * * *."

Section 198 of the Revised Chicago Code of 1931 describes the duties of the Superintendent of Maps and Plats as follows:

"The Superintendent of Maps shall be ex-officio Examiner of Subdivisions, and it shall be his duty to examine any map, plat or subdivision of any block, lot, sub-lot, or any part thereof, or of any piece or parcel of land, situated within the city of Chicago presented or submitted to him for approval, and if he approves of the same he shall so certify."

Section 3 of article 5 of the Cities and Villages act (Par. 73, chap. 24 of Smith and Hurd's Revised Statutes of 1935), provides as follows:

"No map or plat of any subdivision presented for record, affecting land within the corporate limits of any city, village or incorporated town, which has adopted heretofore or shall adopt hereafter an official plan in the manner prescribed in this Act, * * * shall be entitled to record or shall be valid unless the subdivision thereon shown, shall provide for streets, alleys and public grounds in conformity with any requirements applicable thereto of such official plan."

Section 736 of the Revised Chicago Code of 1931 provides the following:

"Whenever land is subdivided within the corporate limits of the city there shall also be laid out public alleys of a minimum width of sixteen feet in the rear of all lots in such subdivisions."

In the foregoing sections of the statutes and the Revised Chicago Code of 1931 the powers of the City Council and of its designated official, the Superintendent of Maps and Plats, are clearly defined.

Relative to the contention of the railroad company that this plat is in statutory form and that it is mandatory on the Superintendent of Maps to approve the same, we disagree with him in that there are no alleys, as provided for in section 736 of the Revised Chicago Code and section 3 of article 5 of the Cities and Villages act (Par. 73, chap. 24 of Smith and Hurd's Revised Statutes of 1935). Therefore, it is our opinion that it is not mandatory on the Superintendent of Maps to approve this plat.

However, in section 737 of the Revised Chicago Code of 1931 the Superintendent of Maps and Plats, as ex-officio Examiner of Subdivisions, is given discretionary powers with reference to the approval of plats. The language of that section is as follows:

"In areas of the city where the foregoing requirements in relation to subdivision cannot consistently be carried out, the arrangement, location and width of the public streets and alleys shall conform as nearly as may be to the surrounding territory, and such variation therefrom as may be necessary shall be subject to the discretion of the Superintendent of Maps as ex-officio Examiner of Subdivisions for the city of Chicago."

The property attempted to be re-subdivided, as evidenced by this plat, is within the right of way of the Chicago and Western Indiana railroad.

The city of Chicago would be benefited by the re-subdividing into lots of this property in that the revenue derived from taxation of the property as re-subdivided will, no doubt, be increased. The City would also be benefited by reason of the fact that it would save large sums of money which it would necessarily be required to expend for the upkeep of alleys.

By reason of the foregoing facts it is our opinion that the Superintendent of Maps would not abuse the discretionary power granted to him under section 737 of the Revised Chicago Code of 1931 above cited if he were to approve this plat wherein new lots are created without alleys.

Your second query relative to the approval of Plat No. 1 relates to the contention of the railroad that because the Commissioner of Public Works approved its plans, as required of him by the Track Elevation ordinance of May 26, 1913, the City is now estopped from forcing the railroad to remove retaining walls enclosing part of a street not vacated in the ordinance, although this was done in error. This is the triangular cutoff at the corner of West 28th place and the north and south alley east of Canal street, containing approximately 85 square feet, which is an encroachment on City property.

The law in reference to encroachment is that every actual encroachment upon a highway by the erection of a fence or building thereon, or any permanent or habitual obstruction thereof, may be safely said to be a nuisance, even though it does not operate as an actual obstruction of public travel. (Wood, *Nuisances*, vol. 1, p. 302.)

Thus in the case of *Advance Elevator Company v. Eddy*, 23 Ill App 352, it was held that the obstruction of an alley by a railroad embankment without public authority is a public nuisance.

Section 7 of article 5 of the Cities and Villages act (Par. 62, chap. 24 of Smith and Hurd's Revised Statutes of 1935), gives the City Council the power to dispose of such encroachments.

While the statute of limitations cannot run against a municipality in matters such as control of streets, which are public in their nature, yet the doctrine of equitable estoppel can be raised to preclude the City from disturbing the occupants of said streets where valuable improvements have been made upon the property in question (including the streets), which improvements are valuable in and of themselves, or because they are used as a part of and in connection with other improvements on the owner's property abutting the street; and particularly in cases where to remove the improvement from the street would seriously damage the owners and would be only of theoretical benefit to the public. (*City of Chicago v. Union Stock Yards and Transit Company*, 164 Ill 224); *Illinois Steel Company v. City of Chicago*, 229 Ill 303; *Chicago, Rock Island and Pacific Railroad v. Joliet*, 79 Ill 25; *Chicago and North Western Railroad Company v. Elgin*, 91 Ill 251; *People v. City of Rock Island*, 215 Ill 488). It is probable, therefore, that under the cases above cited a court of equity would restrain any attempt to remove such improvements.

* * * * *

CITY COUNCIL'S POWER TO VACATE STREETS AND ALLEYS

(No. 9080—A.A.S.—March 4, 1936—2½ pp.)

The power to vacate alleys and streets is vested by law entirely in the City Council, which may exercise this power by ordinance whenever it shall determine that the public interest will be subserved by vacating any street or alley, or any part of a street or alley. Such an ordinance must be passed by an affirmative vote of at least three-fourths of the members of the City Council. The only manner by which the vacation could be set aside is by a repeal of the vacating ordinance which has not yet gone into effect.

OPINION OF FOREGOING SYNOPSIS

Your letter of January 30, 1936, relative to vacation of streets and alleys, addressed to Honorable Edward J. Kelly, Mayor of the city of Chicago, was turned over to this department for consideration and answer.

We have given the matter considerable study and have come to the conclusion that the power to vacate alleys and streets is vested entirely in the City Council. The City Council on January 9th of this year, as you know, passed an ordinance providing for the vacations mentioned in your letter of January 30th, which ordinance was passed by a vote of 45 to 0.

The statute on vacation of streets, alleys, and highways provides that whenever the City Council shall determine that public interests will be subserved by vacating any street or alley, or part thereof, they may do so by ordinance, provided that such ordinance shall be passed by the affirmative vote of at least three-fourths of the members of such City Council.

The statute further provides that the determination of such corporate authorities that the nature and extent of the public use or the public interest to be subserved is such as to warrant the vacation of such street or alley, or part thereof, so vacated, shall be final and conclusive, and the passage of such ordinance shall be sufficient evidence of such determination, whether so recited in the ordinance or not.

In view of the fact that the Council passed this ordinance without a dissenting vote, and in view of the law governing the same, we are of the opinion that there is nothing which this department can do concerning the vacation. It is too late to reconsider the ordinance, and the only manner by which the vacation could be set aside at this time is by a repeal of the ordinance, which matter would have to be taken up with the City Council.

RECORDING OF VACATION PLAT

(No. 9078—*Commissioner of Public Works—A.A.S.—February 28, 1936—3 pp.*)

If a plat of dedication is in apparent conformity with the law, the Examiner of Subdivisions should perform his ministerial duty and permit the plat to be placed on record pursuant to the ordinance of vacation and dedication of which the plat is a part.

The question of whether a damage suit might be filed by one or more of the property owners whose property may be damaged by the ordinance of vacation and dedication is not a matter to be determined by the Examiner of Subdivisions, nor can he refuse to permit the recording of the plat of vacation and dedication because he believes a suit for damages might be instituted against the City.

Citations:

Statute: SH '35, 145: 1.

Ordinance: Coun. J. (1935-36), pp. 1240, 1241.

REPOSSESSION OF VACATED STREET—REMEDY FOR FAILURE OF RAILROAD TO PAY SHARE OF VIADUCT CONSTRUCTION

(No. 9347—*Commissioner of Public Works—J.J.S.—November 27, 1936—3½ pp.*)

The City cannot repossess itself of a vacated street by repealing the vacation ordinance if that ordinance has gone into effect, but must either secure a dedication of the street by the owner or exercise its power of eminent domain.

When a railroad company accepted an ordinance vacating a part of a street within its territory under the obligation to construct a viaduct at the joint expense of the railroad company and the City, and the company has failed to pay its share of the viaduct cost, the City may demand payment when the viaduct is being built, or else institute suit for costs advanced by the City because of the railroad company's default.

Citations:

Ordinances: Coun. J. (1931-32), p. 869, 870 (103rd Street viaduct—Vacation of 110th Street).

Cases: *Counselman v. Wisconsin Lime and Cement Co.*, 299 Ill 84 (1922).
Gormley v. Day, 114 Ill 185 (1885).
Belleville v. Hallowell, 41 Kan 192 (1889).

Other reference: McQuillin, *Municipal Corporations* (2nd ed.), sec. 1538.

OPINION OF FOREGOING SYNOPSIS

In your letter of November 12, 1936, to the Corporation Counsel you call attention to two ordinances passed by the city of Chicago, both dated July 30, 1931, (*Coun. J.*, pp. 869, 870). The first ordinance provided for the extension of E. 103rd street across the lands of the New York, Chicago, and St. Louis Railroad company and for the building of a viaduct on said E. 103rd street, as extended, across the tracks of said company, at the joint expense of the company and the City. The terms of this ordinance, before submission to the City Council, had been approved by the Illinois Commerce Commission (Cause No. 20086) on March 17, 1931. The second ordinance vacated E. 110th street, the property reverting to the company. Section 2 of the vacating ordinance provides that the vacation therein provided for is made upon the express condition that the company accept the viaduct ordinance within sixty days. This was done by the company. It is now in possession of E. 110th street. By acceptance the company obligated itself to live up to the provisions of the viaduct ordinance.

You state in your letter that under date of October 29, 1936, the City received an offer of \$420,000.00 from the Public Works Administration to defray part of the cost of constructing the proposed viaduct but when the City at a conference with the vice-president of the aforesaid company requested the company to comply with the aforesaid viaduct construction ordinance the company refused to go ahead because of its existing financial obligations.

You desire to be advised if the vacation of E. 110th street can be nullified, if the City can repossess the vacated street in the event the company will not cooperate in the construction of the proposed viaduct over E. 103rd street.

When E. 110th street was vacated the title vested in abutting property owners. (*Counselman v. Wisconsin Lime and Cement Company*, 299 Ill 84). Before this property could again be used for street purposes there would have to be either a dedication by the owner or the exercise of the power of eminent domain by the City. Under the statute entitled "Vacation of streets, alleys and highways" it is provided that streets, alleys or highways may be vacated by an affirmative vote of at least three-fourths of the Council elected. If the vacating ordinance goes into effect the City Council loses jurisdiction to legally repeal the same.

In *Gormley v. Day*, 114 Ill 185 in considering the question of repeal of a vacating ordinance the court said:

"An ordinance vacating a street may be repealed before it has gone into effect, and before any rights have become vested under it."

By inference the court here indicates that an ordinance vacating a street cannot be repealed when it has gone into effect.

In *Belleville v. Hallowell*, 41 Kan 192, the question presented was whether or not the City became invested with all its former rights to an alley when an ordinance vacating an alley was subsequently repealed. In passing on this question the court said:

"When the alley was vacated by the ordinance, it was the same in legal contemplation as if it had never existed; as if it were a town lot and not an alley * * *. The alley was not restored to the city by the operation of the repeal."

McQuillin in *Municipal Corporations* (2nd ed), section 1538 citing *Atchison, T. & S. F. R. Co. v. Shawnee*, 183 Fed 85 as his authority lays down the following rule:

"Where a street has been vacated and the title thereto vested in a railroad company, the municipality cannot thereafter, without condemnation or other proceedings require the company to open up the street and put it in condition for public travel."

It is our opinion that the City cannot repossess itself of E. 110th street by passing an ordinance repealing the ordinance vacating the aforesaid street. The City's remedy is demand that the company contribute its proper share to the cost when the viaduct is being built, and on its failure to do so to bring suit against the company for amounts advanced by the City on account of the company's default.

TITLE TO WATER MAIN IN VACATED STREET

(No. 9143—*Commissioner of Public Works—J.J.S.—May 1, 1936*
—21½ pp.)

A water main in a street vacated by the City without any provision to the contrary in the ordinance of vacation becomes the property of the owner of the vacated street.

Citations:

Ordinance: Coun. J. (1904-05), p. 1904.

Case: *People v. Chicago*, 154 Ill App 578 (1911).

OPINION OF FOREGOING SYNOPSIS.

From your letter and correspondence thereto attached, it appears that the city of Chicago, approximately forty-five years ago installed a water

main in N. Leavitt street, from Oakdale avenue to a point 125 feet south of the south line of Oakdale avenue. N. Leavitt street from Oakdale avenue to the point in question was subsequently vacated. (*Coun. J.*, 1904-05, p. 1904). However, the main was never removed but has been maintained by the City for thirty-one years up to the present time to serve other buildings in the immediate vicinity. The vacated street is part of a large tract of land at Diversey street and Clybourn avenue which tract has been purchased by the government for a housing project.

The Director of Housing, Federal Emergency Relief Administration, has retained \$221.88 from the purchase price, the amount that the Commissioner of Public Works estimates is the present value of the main plus cost of labor if the main is to be abandoned and capped. He refuses to pay the above amount to the property owner until the owner secures a release from the City.

The attorney for the owner takes the position that the street being vacated without any reservation as to the water main, that the main became the property of his client. He desires a release from the City without any payment to the City. You desire us to advise you as to what procedure your department should follow in this matter.

* * * * *

On examination of the vacating ordinance it shows no reservation for a water main. If a reservation had been made it is a question whether the reservation would be legal. In the case of *People v. City of Chicago*, 154 Ill App 578, where the City in the vacating ordinance reserved an easement for sewers and water pipes, the court held that no such power was given to the City in the statute providing for a vacation. The court said at page 583:

"We think that the ordinance was operative as a vacation of the portions of the street and alley which by its terms were vacated, and that the proviso that in a certain contingency the ordinance should be void and the attempted reservation of a right in the city to maintain a sewer and water pipes in the vacated portions of said street and alleys were unauthorized by law and invalid. *Cooper v. Detroit*, 42 Mich 584; *Wirt v. McEnery*, 21 Fed 233; *Cheshire Turnpike v. Stevens*, 10 NH 133."

Under the circumstances it is our opinion you would be justified in accepting the offer of the attorney * * * * *

B. Use of Streets, Sidewalks, and Alleys

SALE OF EVERYTHING BUT NEWSPAPERS ON CERTAIN STREETS

(No. 8998—Commissioner of Police—M.H.F.—January 7, 1936—10½ pp.)

The Municipal Court order finding unconstitutional the ordinance which prohibits the sale of everything but newspapers

on certain streets and public places is erroneous, and the Commissioner of Police should continue to enforce the section until such a time as the State Supreme Court shall hold it invalid and unconstitutional, or until a court of competent jurisdiction should enjoin him from enforcing it.²¹

No one has an inherent right to use the City's streets as a place of business, and the City may regulate, limit, or prohibit the special or extraordinary use of its streets for private gain. The power to regulate the use of the streets may be exercised solely for the welfare and safety of the public.

The exemption of the sale of newspapers by the ordinance is not an unlawful discrimination which renders the ordinance manifestly unreasonable. It is the general custom and practice of most of the great cities of the world to permit the sale of daily newspapers upon their streets, although many of those cities find it necessary to prohibit the sale of other articles of merchandise upon their streets in order to conserve the streets to the public for their primary purpose of travel.

The application of the ordinance only to the so-called "Loop" district and to a certain north side district does not make the ordinance unreasonable and discriminatory. The law does not require that an ordinance apply to all sections of a city in order to be valid and constitutional. It is only necessary that the district or districts to which it applies need peculiar or exceptional treatment. The "Loop" area and the north side district described in the ordinance are highly congested areas.

Citations:

- Constitution:** United States, Fourteenth amendment
Illinois, art. II, sec. 2, 4.
- Statute:** Cities and Villages act, art. V, sec. 7, 9, 10, 14, 15, 20, 41, 75.
- Ordinance:** Code '31: 974 as amended Coun. J. (1934-35), p. 2228.
- Cases:** People ex rel. Lapice v. Wolper, 350 Ill 461 (1933).
People ex rel. Johns v. Thompson, 341 Ill 166 (1931).
Chicago Motor Coach Co. v. Chicago, 337 Ill 200 (1930).
Ferguson Coal Co. v. Thompson, 343 Ill 20 (1931).
Chicago v. Eagle Taxi Company, 273 Ill App 614 (1933).
Chicago v. Collins, 175 Ill 445 (1898).
Klever Karpot Kleaners v. Chicago, 323 Ill 368 (1927).

²¹ The Supreme Court of Illinois reversed the Municipal Court order and upheld this ordinance (sec. 974 as amended, *Coun. J.*, 1934-35, p. 2228) in *Chicago v. Rhine*, 363 Ill 619 (1936).

Melton v. City of Paris, 333 Ill 190 (1929).
Dowart v. City of Jacksonville, 333 Ill 143 (1929).
Consumers Company v. Chicago, 298 Ill 339 (1921).
Consumers Company v. Chicago, 208 Ill App 203 (1918).
Biffer v. Chicago 278 Ill 562 (1917).
Clark v. Chicago, 229 Ill 363 (1907).
Chicago v. McKinley, 344 Ill 297 (1931).
Chicago v. Brownell, 146 Ill 64 (1893).
L'Hote v. New Orleans, 177 US 587 (1899).
People v. Cregier, 138 Ill 401 (1891).
Knoxville v. Bird, 12 Lea (Tenn.) 121 (1883).
Gundling v. Chicago, 176 Ill 340 (1898), affirmed 177 US 183 (1899).
Goodrich v. Busse, 247 Ill 366 (1910).

Other reference: McQuillin, Municipal Corporations, (2nd ed.) vol. 2, sec. 699, 700.

OPINION OF FOREGOING SYNOPSIS

With your communication of December 30, 1935, you forward your file relative to the prosecution of C—— R——, charged with violating section 974 of the Revised Chicago Code of 1931. Among the documents contained in the file is a copy of an order entered December 27, 1935, by Judge Eugene L. McGarry of the Municipal Court of Chicago, declaring said section unconstitutional. You request our opinion upon the matter.

We contemplate perfecting an appeal from the above mentioned order of the Municipal Court to the Supreme Court of Illinois. In the meantime our examination of the ordinance section fails to convince us that it is subject to successful attack on the grounds of unconstitutionality or that Judge McGarry's order would be affirmed if and when reviewed by the Supreme Court.

The section as amended May 14, 1934 (*Coun. J.*, p. 2228), reads as follows:

"974. *Sale of everything but newspapers prohibited within defined areas.*) It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale, or solicit any other person to purchase, any article whatsoever, except daily newspapers, on any street, alley or other public place in the City of Chicago within the district bounded on the north by the Chicago river, on the south by the south line of Roosevelt road, on the east by Lake Michigan, and on the west by the Chicago river or within the district bounded on the north by the north line of N. Argyle street, on the south by the south line of W. Montrose avenue, on the east by Lake Michigan and on the west by the center of N. Clark street; provided, that the Mayor may in his discretion authorize the Commissioner of Compensation to issue temporary permits to street vendors authorizing them to sell toys and novelties within the said districts between the fifteenth day of December and the twenty-fifth day of December of each year."

The section is one of those contained in chapter 17 entitled "Miscellaneous Restrictions and Regulations as to Use of Streets, Alleys and Sidewalks." The authority to enact and enforce the section is found in the expressly delegated powers enumerated in article V of the Cities and Villages act. These powers are broad and include authority to open and improve streets (section 7); to regulate the use of the same (section 9); to prevent and remove encroachments or obstructions upon the same (section 10); to regulate the use of sidewalks (section 14); to regulate and prevent the throwing or depositing of offensive matter in the same (section 15); to regulate traffic and sales upon the streets, sidewalks and public places (section 20); to license, tax, regulate, suppress, and prohibit hawkers and peddlers (section 41); and to declare what shall be a nuisance and to abate the same (section 75).

The particular districts mentioned in the ordinance section are well known to be congested areas, wherein both vehicular and pedestrian traffic is dense. Of the fact that they are congested districts, we have no doubt that the courts will take judicial notice.

The streets of the City consist not merely of the roadway portion but also the sidewalk and parkway portions thereof. (*People ex rel. Lapice v. Wolper*, 350 Ill 461.) No one has any inherent right to use the streets as a place of business. Where one seeks a special or extraordinary use of the streets for his private gain, the City may regulate such use, limit it, or even prohibit such use. (*People ex rel. Johns v. Thompson*, 341 Ill 166; *Chicago Motor Coach Co. v. City of Chicago*, 337 Ill. 200; *Ferguson Coal Co. v. Thompson*, 343 Ill 20; *City of Chicago v. Eagle Taxi Co.*, 273 Ill App 614.) The right to regulate the use of streets includes the right to impose reasonable conditions and restrictions and the power to promote general welfare. (*People ex rel. Johns v. Thompson, supra.*) The City Council may regulate the use of the streets and alleys having in view solely the welfare and safety of the public. (*City of Chicago v. Collins*, 175 Ill 445, 456.) Where an ordinance is within the grant of power conferred upon the municipality the presumption is that it is reasonable. A court should not hold an ordinance unreasonable if there is room for a fair difference of opinion upon the question, though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose. (*Klever Karpel Kleaners v. City of Chicago*, 323 Ill. 368; *Melton v. City of Paris*, 333 Ill 190.) In order to justify a court in interfering on the ground that an ordinance is unreasonable, the proof must be clear and strong, and the action of the City Council is final if there is room for reasonable difference of opinion upon the question. (*Dowart v. City of Jacksonville*, 333 Ill 143; *Ferguson Coal Co. v. Thompson*, 343 Ill 20.)

With the above principles of law in mind, we now consider the grounds of alleged unconstitutionality of the section as stated in the findings and order of the Municipal Court.

The first ground is that the section makes an unreasonable and discriminatory classification in specifying daily newspapers as the sole excep-

tion to the prohibition against the sale and the offering or exposing for sale, and the solicitation of any person to purchase, any article whatsoever.

While it is true that daily newspapers constitute the only articles excepted from the prohibition we are not convinced that the ordinance classification is thereby rendered unreasonable and unlawfully discriminatory. All classification for the purpose of legislation is to some extent discriminatory. Every discriminatory classification is not condemned, but only such as is not based upon some substantial difference which bears a proper relation to the classification. (*Consumers Co. v. City of Chicago*, 298 Ill 339.) In exercising its power to make classifications for the purpose of enacting ordinances over matters within its jurisdiction the City Council is permitted a wide range of discretion, and the question of classification becomes a judicial question only when the legislative action is clearly unreasonable. (*Consumers Co. v. City of Chicago*, 208 Ill App 203.) We do not regard the exemption of daily newspapers as creating an unlawful discrimination so as to render the ordinance section manifestly unreasonable. In determining whether an ordinance is unreasonable, the courts will give regard to all existing circumstances and contemporaneous conditions, the object sought to be attained, and the necessity for the ordinance. (*Biffer v. City of Chicago*, 278 Ill 562.) The power to declare ordinances void for unreasonableness is always exercised with great caution. (*Clark v. City of Chicago*, 229 Ill 363). For the municipality to permit vendors to use congested thoroughfares and to sell all articles of merchandise on the streets within the so called "Loop" district, or at Clark and Madison streets where the violation is alleged to have occurred in the present case, thus obstructing the free use of the streets by the public, is unthinkable. It is, however, the general custom and practice followed in most of the great cities of the world to permit the sale of daily newspapers upon the streets, notwithstanding the fact that many of such cities find it necessary to prohibit the sale of other articles of merchandise upon the streets, or upon congested streets, in order to conserve the streets to the public for their primary purpose of travel. The exemption of newspapers from the prohibition appears therefore to be a reasonable one and not detrimental to the public welfare and to be a proper exercise of discretion by the City Council under its broad powers to classify for purposes of legislation and regulation. It is therefore believed that the Municipal Court erred in finding the ordinance section unconstitutional for the above discussed reason.

The second ground of alleged unconstitutionality stated in the order of the Municipal Court is that the ordinance section makes an unreasonable and discriminatory classification in specifying the district bounded on the north by the Chicago river, on the south by the south line of Roosevelt road, on the east by Lake Michigan and the west by the Chicago river, as the sole district with which said ordinance shall apply.

Our opinion is that this finding is unsound. As a matter of fact, the "Loop" district above described is not the only district to which the ordinance applies. The Municipal Court seems not to have known or to have been informed of the north side district added by the amendment of May 14, 1934. Assuming for the purpose of this opinion that the only district

to which the ordinance section applies is the so called "Loop" district, we would still be unable to see any legal objection to the ordinance. The law is that it is not necessary that an ordinance apply to all sections of a city in order to make it valid and constitutional. So long as it appears that the district to which it is made to apply requires peculiar or exceptional treatment an ordinance may properly be designed to apply only to a certain designated part or parts of the territorial limits of the municipality enacting it. (McQuillin, *Municipal Corporations*, 2d ed., vol. 2, section 700.) The following are examples of ordinances of this character which have been sustained as reasonable: Prohibiting parking of motor vehicles within the "Loop" district of Chicago (*City of Chicago v. McKinley*, 344 Ill 297); forbidding freight carrying vehicles of excessive weights to use certain streets (*Ferguson Coal Co. v. City of Chicago*, 343 Ill 20); limiting book-making and pool selling to certain localities (*City of Chicago v. Brownell*, 146 Ill 64); designating limits in which prostitutes shall dwell (*L'Hote v. New Orleans*, 177 US 587); forbidding saloons in certain areas (*People ex rel v. Creiger*, 138 Ill 401; forbidding erection of wooden buildings in designated areas [*Knoxville v. Bird*, 12 Lea (Tenn.) 121.] The matter of restricting sales of articles of personal property on the streets of certain localities is a matter over which the municipal legislative body has and should have discretionary authority, as that body is the best judge of the municipality's own affairs. Because the "Loop" district of Chicago is the very heart of the City and the business center of a vast metropolitan area, we cannot believe the Supreme Court would fail to recognize that it required exceptional treatment in order to keep its thoroughfares open for purposes of travel, or would fail to sustain the validity of a reasonable ordinance designed to effectuate that purpose.

The third finding in the order is that the ordinance makes unreasonable and discriminatory classification in specifying the streets, alleys, and other public places within said "Loop" district for the application of the ordinance.

What we have said with reference to the second finding is applicable to this point. To contend that the City Council may not enact an ordinance having application to streets, alleys, and public places without making it applicable to private property within the district is regarded by us as absurd. The reports of the courts of this and many other states are full of cases upholding the validity of ordinances which have merely a limited application to public highways and public places. (McQuillin, vol. 2, section 699.)

The next finding in the order is that section 974 exceeds the power of the City and the City Council in that the enforcement thereof would prohibit and prevent the sale, offering for sale and solicitation of any person to purchase, any article whatsoever, except daily newspapers, within the "Loop" district, either at wholesale or retail, in stores and other public places licensed by the City to sell and offer for sale, and solicit other persons to purchase articles other than daily newspapers.

This finding we believe is clearly erroneous for it is not seen how it could successfully be contended that by prohibiting sales of articles on the

streets, alleys, and public places only, within a prescribed district, it could possibly be read as a prohibition against selling articles on private property within the district. The privileges conferred by ordinances upon storekeepers within the district to engage in businesses subject to license would not be interfered with by the ordinance prohibiting sales upon public thoroughfares. The fact that the storekeeper, restaurateur, or hotel keeper caters to the public does not make his place of business a public place as that term is used in section 974.

The last finding is to the effect that the section is in direct contradiction and in violation of the 14th amendment to the Constitution of the United States, which is the due process section, and of section 2 (the due process section) and section 4 (the freedom of speech section), of article II of the Constitution of the state of Illinois.

The City having the authority to enact the ordinance in question and provide a penalty for its violation, which ordinance applies to all citizens within the community, no principle of the Constitution of the state of Illinois or of the United States, or the amendments thereto, was violated. (*Gundling v. City of Chicago*, 176 Ill 340, affirmed 177 US 183; *Goodrich v. Busse*, 247 Ill. 366.)

In conclusion, it is our opinion that each and every one of the findings contained in the order of the Municipal Court is erroneous and that the court erred in dismissing the City's complaint.

Our advice to you is that you continue to enforce the ordinance section until such time as the Supreme Court of Illinois shall hold it invalid and unconstitutional, or until you are enjoined from enforcing it by a court of competent jurisdiction.

SOLICITATION OF BUSINESS FROM DOORWAY

(No. 9528—C.N.—June 1, 1937—2½ pp.)

Solicitation of business from the doorway and vestibule of a store can be stopped only if the right of the general public to use the streets and sidewalks is interfered with. If the solicitor emerged from the doorway and actually used the sidewalk for the promotion of business, or if the practice caused large groups to congregate in front of the store, then the solicitation might constitute undue interference with the rights of the general public to use the sidewalks.

Citation: 18 Op. Corp. Coun. 679 (No. 8318).

VALIDITY OF PARKING PROHIBITION IN LOOP

(No. 9601—C.P.H.—August 20, 1937—2½ pp.)

The provision in the Revised Uniform Traffic code which prohibits parking in the Loop and regulates unloading from vehicles is valid. The City has statutory power to regulate parking.

Citations:

Statute: ISBS '35, 121: 301.

Ordinances: Revised Uniform Traffic Code, Coun. J. (1936-37), p. 2805, sec. 26.
Code '22: 3855.

Cases: *Haggenjos v. Chicago*, 336 Ill 573 (1930).
Chicago v. McKinley, 344 Ill 297 (1931).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your letter of August 6, 1937, wherein you request our view as to the validity of the ordinance regulating parking in the Loop district of the city of Chicago, and an article appearing in the August, 1937, issue of *Westways*, the official magazine of the Automobile Club of Southern California.

Please be advised that the City Council enacted an ordinance amending section 3855 of the Chicago Municipal Code of 1922 prohibiting all parking in the Loop district at any time during business hours of any business day, which ordinance in the case of *Haggenjos v. City of Chicago*, 336 Ill 573, was held unreasonable and invalid because it amounted to a prohibition of automobiles in the various parts of the territory described for the transaction of business or the receipt and delivery of goods in the ordinary way. This case however clearly established the power of the City to regulate parking. The court said, page 576:

"* * * It is not open to question that the legislature has conferred upon the city the power to regulate the use of the streets and the traffic upon them—that is, the passage of persons and vehicles back and forth upon them—and to prevent obstruction of them. Although this power of regulation has been conferred upon the City Council, the legislature has not specified the precise manner in which it shall be exercised, and therefore the reasonableness of the exercise of the power by the Council is open to inquiry by the Courts * * *".

On December 14, 1927, the City Council passed an ordinance modifying the provisions of section 3855 as amended by permitting the stopping of vehicles for not more than three minutes for loading or unloading as to passenger cars, and thirty minutes as to commercial vehicles. In the case of the *City of Chicago v. McKinley*, 344 Ill 297, the court held that this ordinance was valid as it was a reasonable exercise of the power to regulate parking by the council and was not subject to the same criticism as the former ordinance.

The City Council recently enacted into law the Revised Uniform Traffic code of the city of Chicago, *Journal of the Proceedings of the City Council*, December 9, 1936, page 2805, and it is our view that section 26 thereof, is valid as it contains the same provisions pertaining to the regulation of parking in the Loop district as the ordinance that was held valid in the McKinley case.

Subsequent to the above decisions, the legislature of Illinois passed a Uniform Act Regulating Traffic on Highways which specifically provided that the provisions of said act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from regulating the standing and parking of vehicles. (Illinois State Bar Statutes, 1935, chapter 121, paragraph 301).

* * * * *

DOUBLE PARKING BY DELIVERY TRUCKS

(No. 9729—Chief Justice of the Municipal Court—J.H.S.—December 18, 1937—4½ pp.)

Double parking by delivery trucks for the purpose of making deliveries is prohibited by the Revised Uniform Traffic code, and the practice of police officers in issuing arrest slips for such double parking is not only reasonable but is required for the proper enforcement of the traffic code.

Citations: Coun. J. (1936-37), p. 2802-2810 (Revised Uniform Traffic code, sec. 19, 24).

Code '31: 2018.

"NO PARKING" SIGNS NOT OFFICIALLY AUTHORIZED

(No. 9166—C.N.—May 19, 1936—2 pp.)

A "no parking" sign not officially authorized by the City through its Department of Public Works need not be respected, and may be removed as a public nuisance upon complaint to the Department of Public Works.

Citation: Uniform Traffic code, art. I, sec. 1; art. III, sec. 6 (par. 3), sec. 9.

FEE FOR LOADING ZONE SIGNS

(No. 9144—*Acting Commissioner of Streets and Electricity—M.H.F.—May 2, 1936—3½ pp.*)

The Commissioner of Streets and Electricity may charge a fee for the erection and maintenance of signs placed to designate loading zones which are established to benefit and serve only one building or premises and not as a public benefit to serve more than one building or premises.

Citation: Uniform Traffic Code, art. III, sec. 6 (as amended Coun. J., 1934-35, p. 3989); art. V, sec. 18.

PERMITS FOR OPENINGS IN STREETS CONTROLLED BY PARK DISTRICT

(No. 9569—*Commissioner of Public Works—A.F.G.—July 23, 1937—2½ pp.*)

The City may be required to take out and pay for permits from the Chicago Park District to make openings in streets acquired by the Board of South Park Commissioners under authority of the statute creating the Board, and to pay the cost to the Park District of restoring the streets to their normal condition.

In the case of streets which the City has turned over to the Park District, but in which it has reserved the right to make repairs to water mains and sewers, no charge should be made by the Park District for the issuance of permits to make those repairs. The City, however, should reimburse the Park District for the cost of restoring the pavement wherever the City has had to make an opening.

Citation: Ill. Private Laws (1869) vol. I, p. 358 (Board of South Park Commissioners act).

COMPENSATION FOR A VAULT BENEATH COMMON LAW DEDICATED ALLEY

(No. 9195—City Comptroller—J.J.S.—June 11, 1936—3 pp.)

The City cannot collect compensation for a vault beneath an alley, the fee title of which belongs to the abutting property owners.

Citation: *Sears v. Chicago*, 247 Ill 204 (1910).

OPINION OF FOREGOING SYNOPSIS

You have requested an opinion from the Corporation Counsel relative to the City's right to collect compensation for a vault under the surface of the alley in the rear of 140-142 W. Monroe street. You state that the payment of compensation has been persistently refused on the ground that the vault is located on what is known as school section land, the fee to the alley being in the abutting owners. You request that we inquire further into this particular case and if in our opinion there is no liability recommend cancellation of the warrant in question.

You likewise submit the same problem as to the Moir Hotel company located at 79 W. Madison street.

An examination of the plats in the City map department discloses the fact that 140-142 W. Monroe street and 79 W. Madison street are in School Section Addition to Chicago. The legal description of 140-142 W. Monroe street is Lot 28 in Assessor's Division of Block 118, School Section Addition to Chicago, Section 16, Township 39 North of Range 14. The legal description of 79 W. Madison street is Lots 6 and 7 in Block 119 in the same School Section Addition to Chicago.

In the case of *Sears v. City of Chicago*, 247 Ill 204 the Supreme Court held that the plat of School Section Addition to Chicago had not been filed in accordance with the statute then in force, amounting to a common law dedication, that therefore, the fee title to the streets and alleys remained in the abutting property owners, the City having an easement therein only for street purposes. The court also held that there was no obligation on the owner to pay compensation to the City or the use of sub-sidewalk space, but that the owner would have to give way to the City if this use became inconsistent with the City's use of its easement for street purposes.

The court said at pages 216 and 217:

In cases, however, where the municipality only has an easement in its streets and the fee remains in the abutting lot owners, the relative rights of the municipality and the abutting lot owners are to be determined under entirely different rules of law. When private property is taken for public use, the general rule is that it can only be taken to the extent that the public use to which it is to be applied requires. A

law could not be sanctioned which would permit a corporation to condemn private property for the sole purpose of applying such property to a purely private use. The law provides a method by which the owner of real estate which is platted into town lots may, if he so desires, convey a determinable fee to the municipality by the execution of a properly acknowledged and recorded plat. When this course is adopted, the owner, having the power to make any disposition of his property he sees fit, can invest the municipality with the fee. If such statutory plat is made and recorded, all persons who subsequently purchase lots according to such plat will be presumed to have notice that they acquire no rights in the public streets except those already referred to. On the other hand, one buying a lot abutting upon a street in which the city has only an easement must be presumed to purchase with knowledge of the fact that a conveyance of the abutting lot carries the title to the center of the street, subject only to the easement of the public therein. The abutting lot owner thus being the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public. [3 *Kent's Commentaries*, (12th ed.), 433; *Hurley v. Chandler*, 6 Mass 454; *Tucker v. Tower*, 26 Mass 108.] It is as unreasonable as it is illogical to say that the abutting lot owner who owns the fee in a street, subject only to the easement of the public, must pay the city for the privilege of using his own property in a manner that in no way interferes with or disturbs the full enjoyment of the easement."

Inasmuch as the facts upon which the Supreme Court passed, in the *Sears* case, are similar to those presented in your letters relative to 140-142 W. Monroe street and the Moir Hotel property at 79 W. Madison street the City has no right to enforce collection. We recommend the cancellation of the warrants in question.

PAINTED CROSSWALKS AT OTHER THAN INTERSECTIONS

(No. 9300—*Acting Commissioner of Streets and Electricity—*
J.J.S.—October 3, 1936—3½ pp.)

The City has the power to mark with paint crosswalks across the roadway of streets, even though not at street intersections, whenever such markings are necessary for proper traffic regulation, but the traffic code should be amended so as clearly to give the Commissioner such power.

The City has no right, however, to maintain any traffic control device such as signs and markings on highways under the

control of the State Department of Public Works and Buildings unless that department consents.

Citations:

Statute: ISBS '35, 121: 289, 292, 304, 305.

Ordinances: Coun. J. (1931-32), p. 937, art. I.

Coun. J. (1936-37), p. 2231 (Uniform Traffic Code, art. I; art. III. sec. 12).

OPINION OF FOREGOING SYNOPSIS

In your letter of recent date you desire to be advised as to "the right of the City to mark with paint, crosswalks across the roadway of any street other than at street intersections." The inquiry is particularly directed to Calumet avenue between 26th and 29th streets, a three block stretch without street intersections, where the Drake school is located and where it is necessary to designate a crosswalk on account of traffic hazards.

We find nothing in the statutes limiting the right of the City to designate, on streets under its jurisdiction, crosswalks on the roadway at points other than street intersections, the only limitation being that the traffic control devices used conform to the State manual and specifications.

Section 30 of "An Act in relation to the regulation of traffic," Illinois State Bar Statutes, 1935, section 305, page 2790 grants to the City power to regulate traffic on streets under its jurisdiction by the use of appropriate traffic control devices. This includes signs, markings, etc. It is as follows:

"Local authorities in their respective jurisdiction shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provision of this Act or local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the State manual and specifications."

In section 17 of the same act a traffic control device is defined as follows:

"All signs, signals, markings, and devices not inconsistent with this Act placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic."

In section 14 of the same act, a crosswalk is not limited to street intersections but may take in any portion of roadway. It is defined as follows:

"(a) That portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections.

(b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface."

With the City given the right to regulate traffic and with a crosswalk defined not only as a part of a street at a street intersection but as any portion of a street indicated by lines or markings for pedestrian crossing,

it follows that where necessary for traffic regulation the City has the right to mark with paint crosswalks across the roadway of streets, at other than street intersections. It is legal to establish crosswalks at the Drake school.

On State highways, however, under the control of the Department of Public Works and Buildings of the State of Illinois the City has no right to maintain any traffic-control device without the Department's consent. Section 29 of the foreshaid act provides as follows:

"No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the Department except by the latter's permission."

In your letter you quote article 1 and section 12 of article 3 of the Uniform Traffic code for the city of Chicago as the authority of the Commissioner of Public Works to select and indicate crosswalks. In article 1 (*Coun. J.*, July 30, 1931, p. 937) crosswalks are defined in substantially the same language as the statutes but however a word is missing which makes the definition obscure. We note that the new traffic code now up for passage (*Coun. J.*, Sept. 9, 1936, p. 2231) contains the same error. The definition should be amended to contain the exact language of the statute.

Section 12 of article 3 of the same code authorizes the Commissioner of Public Works to establish crosswalks but limits him to street intersections. The proposed new code contains the same limitation. The wording in both codes is as follows:

"The Commissioner of Public Works is hereby authorized to establish and maintain by appropriate devices or marks, crosswalks at all intersections where in his opinion there is particular danger to pedestrians crossing the roadway.

If the thought is to permit the Commissioner to establish crosswalks not only at intersections but on other portions of the street such as in front of the Drake school, without further Council action, this section should be amended in the proposed new code to give him this power. A proper amendment would be to insert after the word "intersection" in the third line of section 12, the words "and other portions of roadways."

HOUSEHOLD GOODS PLACED ON SIDEWALK BY BAILIFF UNDER EVICTION WRIT

(No. 9549—Attorney for the Bailiff of the Municipal Court—*M.H.F.*—June 29, 1937—21½ pp.)

While the City undoubtedly possesses ample authority to remove obstructions from the streets, including furniture and other chattels placed upon the sidewalks, the bailiff of the

Municipal court should endeavor not to dispose of household effects removed from private premises under writs of eviction so as to obstruct the public streets or otherwise constitute a common nuisance.

For a public official to place obstructions in public streets would be unlawful as in the case of a private individual.

Citations:

Statute: Cities and Villages act, art. V, secs. 9, 10, 14.

Ordinances: Code '31: 900, 975, 976.

Other reference: Op. Corp. Coun., 1915-16, p. 96.

POSTING OF ELECTION NOTICES ALONG SIDEWALKS

(No. 9049—Board of Election Commissioners—J.F.G.—February 10, 1936—11½ pp.)

The posting of election notices upon sidewalks or on standards along sidewalks, such as posts and trees, does not violate the Revised Chicago Code of 1931 as that code expressly excepts notices which may be required by State law or City ordinance.

Citations:

Statutes: Ballot act of 1891, sec. 19.

General Election act of 1872, sec. 47.

Ordinance: Code '31: 4282.

BARRIERS ON PARKWAYS

(No. 9515—Commissioner of Public Works—R.N.—May 7, 1937—3½ pp.)

Parkways may be improved and protected by suitable barriers either by the City or by an abutting property owner, provided that the improvements and barriers are maintained in such a manner as not to become dangerous to persons exercising reasonable care while using the streets.

Citations:

Cases: City of Mount Carmel v. Shaw, 155 Ill 43 (1895).

Murtaugh v. Chicago Motor Coach Co., 269 Ill App 290 (1933).

Village of Barnesville v. Ward, 85 Ohio St 1 (1911).

Other reference: 18 Op. Corp. Coun. 649 (No. 6635).

OPINION OF FOREGOING SYNOPSIS

Sometime ago you asked the Law department for an opinion as to the right of a property owner to fence in or string a wire around the parkway in front of his lot. While the practice is a general one and the question must have arisen on many occasions, it is one on which we are able to find very little in the way of judicial determination.

The legal title to streets and sidewalks—and consequently to parkways—is in the City, and the City is responsible for the safe condition thereof. So it has been held that shade trees in the public streets of a city are the property of the municipality and it has complete control over them. [*City of Mount Carmel v. Shaw*, 155 Ill 43 (1895)]. Subject to such control owners of abutting property may make certain use of the parkways. In the case, of the negligent injuring of a shade tree by a motor coach company it was held that a right of action against the motor coach company accrued to an abutting property owner although the tree belonged to the City, being planted on ground the fee to which was in the City. [*Murtaugh v. Chicago Motor Coach Company*, 269 Ill App 290 (1933)].

In a former opinion by this department we stated that a property owner may beautify and enclose the parkway of the street in front of his residence, provided it is done with due regard to the safety of users of the street (Opinion 6635, volume XVIII, p. 649). We are unable to find a record of any case directly in point in the courts of Illinois. The decision of the Ohio Supreme Court in the case of *Village of Barnesville v. Ward*, 85 Ohio St 1 (1911) is squarely in point. In that case Ward was injured by tripping over a wire that was strung around a parkway in a negligent manner. The court, in its opinion, states:

“It is undoubtedly the common practice in this state, and it would seem to be practically the universal interpretation of the law, that, where a street is sufficiently wide that enough will remain unobstructed to meet the needs of public travel, a municipality may maintain, or permit to be maintained, park strips between the curbing and the paved street and the pavement of the sidewalk, in which strip grass, flowers, and trees may be grown, for the purpose of beautifying and ornamenting the streets of the city and contributing to the pleasure and comfort of its citizens, and may, if it be deemed necessary, construct, or permit to be constructed, proper barriers around the same to prevent travel thereon, and such trees, grass, and flowers growing upon such park strip, and the proper barriers placed around the same to protect them, are not obstructions or nuisances within the meaning of the statute requiring the city council to keep the streets of a municipality in repair, open for travel, and free from nuisances.

“This construction of the law would not authorize a municipality to maintain, or permit to be maintained, a fence, wire, or other barrier around such park strip in such condition as to become dangerous to the life or the safety of any traveler who undertakes to pass over the same,

and, if a pedestrian in the exercise of due care for his own safety is injured by reason of the dangerous or defective condition of the barrier, the municipality is liable in damages for such injury, if it be shown that it knew, or in the exercise of ordinary care should have known, the dangerous condition thereof."

In our opinion parkways may be improved and protected by suitable barriers either by the City or by an abutting property owner, provided that such improvements and barriers are maintained in such a manner as not to become dangerous to persons in the exercise of reasonable care using the streets.

* * * * *

RESPONSIBILITY FOR REMOVAL OF DANGEROUS TREES

(No. 9057—*Commissioner of Public Works—M.D.S.—February 19, 1936—2½ pp.*)

The ownership and control of trees in the parkways is in the City, and so the City is responsible for removing from parkways any dead and dangerous trees as well as live trees which damage property by blocking sewers and raising and breaking sidewalks. The abutting property owner has no control over trees in the parkway, and the City cannot vest in him any responsibility for the removal of dead or dangerous trees in that area.

Citations:

Ordinance: Code '31: 207.

Cases: City of Mt. Carmel v. Shaw, 155 Ill 37 (1895).

Gridley v. City of Bloomington, 88 Ill 554 (1878).

Chicago v. O'Brien, 111 Ill 532 (1884).

OPINION OF FOREGOING SYNOPSIS

Your request for an opinion as to where the responsibility lies for the removal of dead and dangerous trees, as well as live trees growing in parkways which cause damage to sidewalks and sewers, has been received.

Section 207 of the Revised Chicago Code of 1931 entitled *Powers of bureau over trees, plants and shrubs on public highways—city forester* provides, in part as follows:

"The bureau of parks, recreation and aviation under the direction of the commissioner of public works, shall have full power and authority over all trees, plants and shrubs planted and to be planted in the streets and public highways of the city * * *."

The leading authority in Illinois on the subject of the ownership or control of trees in the public streets is the case of *City of Mt Carmel v. Shaw*, 155 Ill 37. In that case the court, in its opinion, at page 43 said:

"Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them." Citing *Baker v. Town of Normal*, 81 Ill 108.

In our opinion inasmuch as the ownership and control of the trees in the parkways is in the city of Chicago, the responsibility for the removal of dead and dangerous trees as well as live trees which cause damage to property by blocking sewers and raising and breaking sidewalks, is likewise in the city of Chicago. Allowing these trees to remain standing or growing may be declared a nuisance, but it is in no way caused by the act of the adjacent property holder, but solely by the action of the elements. The lot owner has no ownership or control of the adjacent street or the trees in the parkway thereof, and the mere fact that he happens to own the abutting property does not in any way create a responsibility in him.

You also inquire whether it would be possible for our City Council to pass an ordinance vesting the responsibility for the removal of these trees in the property owner.

The question presented is somewhat analogous to that where ordinances were passed by different cities in Illinois seeking to compel property owners to remove snow and ice from the sidewalks abutting their property, and in each instance the Supreme Court of Illinois declared such an ordinance invalid. (*Gridley v. City of Bloomington*, 88 Ill 554; *City of Chicago v. O'Brien*, 111 Ill 532.)

C. Chicago River and Harbor

JURISDICTION OVER HARBOR

(No. 9313—*Commandant, Ninth Naval District—J.J.S.—October 16, 1936—3½ pp.*)

The Chicago harbor is subject to the control of the Harbor Master under the direction of the Commissioner of Public Works. The Harbor Master and Assistant Harbor Masters are sworn

as special policemen to carry out the police regulations of the City concerning the harbor.

The City has jurisdiction to punish violations on vessels moored in the Chicago harbor. Persons violating State laws on such vessels are subject to prosecution by the State.

The legal jurisdiction of the City, which extends to three miles beyond the shore line, is not altered by the erection of quays, piers, and breakwaters.

The sheriff as a county and state officer must serve process in that portion of Lake Michigan which is a part of the Chicago harbor.

Citations:

Statute: SH '35, 24: 3, 12, 83.

Ordinances: Code '31: 217, 2827.

CONSEQUENTIAL DAMAGE FROM FILLING IN OF RIVER

(No. 9443—*Commissioner of Public Works—A.A.S.—March 3, 1937—10 pp.*)

The filling in by the United States War department of the Calumet river north of certain property owned by private persons does not amount to a confiscation of property rights inasmuch as the War department is not attempting to fill the river adjacent to or in front of that property, and because there is no actual invasion or taking of that property but merely a consequential damage.

Congress has undisputed power to change the course of any stream or to fill in any harbor or stream.

Citations:

Constitution: United States, Fifth amendment.

Statute: Rivers and Harbors act of 1935.

Cases: Ryan v. Chicago, Burlington and Quincy RR., 59 F (2d) 137 (1932).
South Carolina v. Georgia, 93 US 4 (1876).
Gibson v. United States, 166 US 269 (1896).
Greenleaf Johnson Lumber Co. v. United States, 204 Fed 489 (1913).
Transportation Co. v. Chicago, 99 US 635 (1878).
Scranton v. Wheeler, 179 US 141 (1900).
United States v. Chandler-Dunbar Co., 229 US 53 (1912).
Gilman v. Philadelphia, 70 US 713 (1865).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter dated February 26, 1937, requesting an opinion as to whether or not the filling in of the Calumet river north of the property owned by the Chicago and Calumet River railroad and the Pressed Steel Car company amounts to a confiscation of property rights.

The Rivers and Harbors act of 1935 (Public—No. 409-74th Congress, H. R. 6732, approved August 30, 1935), authorized the War department of the United States to improve the Calumet river so that between certain designated points there would be a channel 300 feet in width with a raised depth of 9 feet.

In an effort to comply with the said act of Congress the Chief of Engineers of the United States army recommended, and the Secretary of War authorized the construction of a cutoff channel to run from the present channel of the Calumet river at a point northerly from the property of the Chicago and Calumet River Railroad company and the Pressed Steel Car company to a point on the Little Calumet river southwesterly from said property, so that the main channel of the Calumet river would no longer run adjacent to the premises of said companies.

The court in the case of *Ryan v. Chicago, B. & Q. R. Co.*, 59 F (2d) 137, 142, said:

"Detailed plans and specifications for the construction of enormous works of this kind are never prepared and approved in advance by Congress, but, after authorization of the work by Congress, the plans are prepared by the officers of the Board of Engineers of the United States Army under the supervision of the Secretary of War, to whom is given a very wide discretion over the construction, maintenance, and alteration of dams, bridges, and dikes in the navigable waters of the United States. 33 USCA, secs. 1, 3, 401, 403. See also 33 USCA, secs. 2, 27, 38, 402, as illustrative of such delegated discretion. The lodgement by Congress of such discretion in the Secretary of War and the Board of Engineers is not a delegation of the legislative power, but of mere administrative detail which the law permits. (Citing cases.)

"It is not contended that the Secretary of War or those acting under him can override the will of Congress. His discretion lies in working out the details which he deems necessary to carry out the project authorized by Congress; but if Congress so desires it may limit the project as to details, and, if it does so, the Secretary of War has no authority to ignore or change those details. * * *"

Congress in the act of 1935 did not limit the project as to details. Therefore, the Secretary of War had authority to work out the details in a manner he felt would result to the best interests of navigation.

The United States Supreme Court has also held that the mere appropriation of monies by Congress for the improvement of a navigable stream, which monies are to be expended under the direction of the Secretary of War, makes lawful any act which the Secretary of War or his subordinates perform in accomplishing the improvement, and their discretion is very wide.

In the case of *South Carolina v. Georgia*, 93 US 4, the facts were substantially these:

The state of South Carolina filed a bill in equity in the Supreme Court of the United States seeking an injunction to restrain the state of Georgia, the Secretary of War, and the chief of the corps of engineers of the United States army, and their agents and subordinates, from obstructing or interrupting the navigation of the Savannah river, in violation of the compact entered into between the states of South Carolina and Georgia in April of 1787. After holding that the various states had surrendered to the general government, by the ratification of the Constitution, whatever rights they may theretofore have had severally to the regulation of navigation, the court addressed itself to the contention of the complainants that, conceding the power of Congress, Congress had not in fact exercised any such authority in this instance. The court held that Congress had exercised its authority and had delegated to the Secretary of War full authority to block up the northerly branch of the Savannah river by merely appropriating money "to be expended under the direction of the Secretary of War for the repair, preservation and completion of the following public works, viz.:

"For continuing the improvement of the harbor at Savannah, \$50,000.00."

At page 13 the court said:

"It is true that neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the Secretary of War, and the mode adopted under his supervision plainly tends to the improvement contemplated. We know judicially the fact that the harbor is the river in front of the city, and the case, as exhibited by the pleadings, reveals that the act of which the plaintiff complains tend directly to increase the volume of water in the channel opposite the city, as well as the width of the waterway. Without relying at all upon the report of the engineers, which was before Congress, and which recommended precisely what was done, we can come to no other conclusion than that the defendants are acting within the authority of the statutes, and that the structure at the cross-tides intended to divert the water from the northern channel into the southern is, in the judgment of the law, no illegal obstruction. The plaintiff, has, therefore, made no case sufficient to justify an injunction, even if the State is in a position to ask for it."

The case of *Gibson v. United States*, 166 US 269, involved a petition to recover damages from the United States because of the construction of a dike by the United States in the Ohio river about nine miles west of the city of Pittsburgh. The plaintiff's petition for damages set forth that she was the owner of certain improved farm land in a high state of cultivation, with a frontage of 1,000 feet on the channel of the Ohio river, on which frontage was a landing which she used in shipping the produce of her farm. The petition then set up that the Congress, by the River and Harbors act of July 5, 1884, had appropriated certain sums of money for improving the Ohio river, and that under such authority the engineering corps commenced the construction of a dike 2,200 feet in length to con-

centrate the water flow in the main channel of the Ohio river, and that by thus concentrating the flow of the water the plaintiff was prevented from having free ingress and egress to and from her pier except at a stage of high water. The court held that whatever damages resulted to the plaintiff were mere consequential damages, and hence not actionable.

At page 276 the court said:

"Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes."

Again in the case of *Greenleaf, Johnson Lumber Company v. United States*, 204 Fed 489, the court said at page 491:

"A preliminary question is presented as to the power and authority of the Secretary of War to make the contemplated improvement, as well as of the lack of specific authority on his part to act, because of the failure of Congress to provide for the work by appropriate legislation. The act of Congress of March 3, 1899 (chapter 425, 30 Stat. 1. 1151), confers large powers upon the Secretary of War respecting the rivers and harbors of the country, and the regulation of the navigation of the same, but whether in terms to do the specific work complained of need not be decided, since the act of March 4, 1911 (chapter 239, 36 Stat. 1265-1275), provision is directly made for the improvement in question, namely 'for the purchase of land and widening of channel,' and under this authority the executive branch of the government has the right to designate the land that it will use to carry out and perform the directions of Congress. The act making the appropriation is a sufficient declaration of the will of Congress that the improvement is desired for the legitimate purposes of commerce and navigation, and hence there can be no legal objection made, either to the making of the contemplated improvement, or the instrumentality chosen to carry out the same, provided the rights of the riparian owner, if any, be properly safeguarded and protected. Here the act sufficiently fixes the location of the improvement, and the pleadings in this case admit that the complainant's lands are within the bounds of the same. *South Carolina v. Georgia*, 93 US 4, 12, 23 L Ed 782; *Gibson v. United States*, 166 US 269, 276, 17 Sup Ct 578, 41 L Ed 996; *Scranton v. Wheeler*, 179 US 141, 157, 21 Sup Ct 48, 54, 45 L Ed 126. * * * *

We, therefore, having the unequivocal statement that where money is appropriated for the improvement of navigation, to be expended under the direction of the Secretary of War, there is to be found ample authorization for any act performed by the Secretary of War or his subordinates in accomplishing the improvement for which the money was appropriated.

We have attempted to show by the foregoing that the Secretary of War and the Chief of Engineers have not exceeded their authority by filling in a portion of the Calumet river which is not adjacent to the property of

either the Chicago and Calumet River Railroad company or the Pressed Steel Car company.

It is the plan of the Secretary of War to fill in a portion of the river northerly from the premises heretofore mentioned and not in front of or adjacent to said premises.

The Federal government has from its inception been immune from liability for consequential damages to property taken for the improvement of rivers, and for damages incident to the prosecution of its projects in that behalf. Thus in interpreting the 5th amendment to the Federal constitution against the taking of private property for public use without just compensation, the courts have protected the interests of private property but have always been careful to make the distinction which exists between the actual taking of property for public use and a consequential injury to such property by reason of some public work where the injury does not result from a direct invasion or trespass.

In the case of *Transportation Company v. Chicago*, 99 US 635, this distinction was definitely stated, and the Supreme Court at page 642 said the following:

"The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every state that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualifications of the doctrine is to be found, perhaps, in *Pumpelly v. Greenbay Company*, 13 Wall. 166, and in *Eaton v. Boston, Concord & Montreal R. R.*, 51 NH 504. In those cases it was held that the permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

A riparian owner may not assert his rights as against paramount public interest in a navigable water.

In the case of *Gibson v. United States*, 166 US 269, heretofore cited, the court said:

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in

respect of navigation created in favor of the Federal government by the Constitution."

In the case of *Scranton v. Wheeler*, 179 US 141, heretofore cited, the United States had constructed a long pier on the submerged lands in a river for the purpose of aiding navigation. This cut the riparian owner off from direct access to deep water and he claimed that his rights had been invaded and his property taken without compensation.

The court held that the government had not "taken" any property which was not primarily subject to the very use to which it had been put, and, therefore, denied his claim. The court in that case said:

"The primary use of the waters and lands under them is for purposes of navigation, and the erection of piers intended to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland, bounding on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal as is his upland, but to be held at all times subordinate to such use of the submerged uplands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

The Supreme Court of the United States in citing the foregoing, in the case of *United States v. Chandler-Dunbar Company*, 229 US 53, 64, said:

"So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control."

Inasmuch as the War department is not attempting to fill in the river adjacent to or in front of the property of the Chicago and Calumet River railroad, we are of the opinion that the Fifth amendment to the Federal Constitution is not in any way being violated because there is no invasion or taking of the plaintiff's premises. We feel that it cannot be successfully urged that Congress is without authority to order the filling in of the so-called superseded portion of the Calumet river in aid of navigation. This is a matter wholly within the power of Congress.

We are further of the opinion that Congress has the undisputed power to change the course of any stream, or to fill in any harbor or stream, and it even has the power to compel boats navigating in a stream to pursue a certain course.

Gillman v. Philadelphia, 3 Wall 713.

Gibson v. United States, *supra*.

United States v. Chandler-Dunbar Company, *supra*.

DISCONNECTION OF PRIVATE SEWERS DISCHARGING INTO CHICAGO RIVER

(No. 9027—Commissioner of Public Works—J.J.S.—January 27, 1936—4½ pp.)

The City has power to require private sewers discharging directly into the Chicago river to be disconnected. The Commissioner of Public Works may revoke any permit granted to drain into the Chicago river, or if no permit has been granted he may request that the practice be discontinued and require that such private sewers be connected to the City's sewers.

Citations:

Ordinances: Code '31: 768, 769, 2829-33, 2838, 2840.

Statutes: SH '35, 24: 65.39, 65.56, 65.74, 65.77, 65.82.

Cases: Harmon v. Chicago, 110 Ill 400 (1884).

Chicago v. Dunham Towing and Wrecking Co., 161 Ill App 307 (1912); 175 Ill App 549 (1913).

Glucose Refining Co. v. Chicago, 138 Fed 209 (1905).

Other reference: McQuillin, Municipal Corporations (2nd ed.), vol. 3, sec. 972, 974.

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter referring to the near completion by the Sanitary District of Chicago of the several projects necessary for the collection of sewage of the City and its treatment prior to its discharge in the Chicago river in accordance with the decree of the Supreme Court of the United States. In this letter you call attention to the fact that a number of structures along the river bank discharge sewage directly into the Chicago river, which discharge will continue to pollute the river.

You desire to be advised as to whether or not "the City has power to require the several owners to disconnect the sewers described, and if so, by what procedure." It is our opinion that the City has such power both under the statutes and the municipal code. We are citing provisions from the statutes and the Code for this opinion.

Under article V of the Cities and Villages act the City Council is given extensive powers in reference to the regulation of sewers and water courses, the primary purposes being to safeguard the health and general

welfare of its citizens. We shall enumerate some of them. The City Council is given power:

- (1) 65.39 "To provide for the cleansing and purification of waters, *watercourses* and canals, * * *
- (2) 65.56. "To regulate the construction, repair and use of vaults, cisterns, areas, hydrants, pumps, *sewers* and gutters."
- (3) 65.82. "To compel the owner of any * * * privy, sewer * * * to cleanse, abate or remove the same, and to regulate the location thereof."
- (4) 65.77 "To do all acts, and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."
- (5) 65.74 "To declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

The Criminal Code declares that rendering impure the waters of any river is a public nuisance. The provision is as follows:

"It is a public nuisance: * * *

3. to corrupt or render unwholesome or impure the water of any spring, river, stream, pond or lake, to the injury or prejudice of others."

Under the authority granted by the General Assembly the City Council has provided in the Revised Chicago Code of 1931 for the safeguarding of the City water. Sections 2829-2832 define the City harbor to include the Chicago river, the Calumet river, their branches and canals connected therewith. Section 2833 provides that no person or corporation shall deposit in the City harbor or within ten miles of the corporate limits of the City any clay, ashes, filth, etc., unless the same is placed within a breakwater. Sections 2838 and 2840 are similar in their purposes. We quote them in their entirety:

"2838. *River, lake—refuse matter—penalty.*) Any distiller, brewer, butcher, pork or beef packer, soap boiler, tallow chandler, dyer, livery stable keeper, or other person whatsoever who shall cause or suffer any offal, manure, rubbish, filth, still, slops, or any refuse animal or vegetable matter, or any foul or nauseous liquid, to be discharged out of or flow from premises owned or occupied by him or thrown into, deposited or left in the harbor shall be fined not less than twenty five dollars and not more than one hundred dollars for each offense."

"2840. *Contents of privy, etc., in lake or river—penalty.*) No person shall throw, drop or permit to fall into the harbor, any offal or any unwholesome substance being or having been part of the contents of any vault, cesspool, catch basin, privy, sink, tub or receptacle.

"Any person who violates or fails to comply with any provision of this section shall be fined not less than ten dollars nor more than two hundred dollars for each offense."

Section 768 of the Code places all sewers under the control of the Department of Public Works. Section 769 provides that no person shall drain into the Chicago river without written authority of the Commissioner of Public Works. It is as follows:

"* * * nor shall any person drain from any point within the limits of the city into the Chicago river or any of its branches, or into any slip connecting therewith, or into any canal or canals constructed under authority of said city, without first obtaining a permit for such drainage from said commissioner of public works. Any person * * * draining from any points within the city limits into the Chicago river or its branches, or into any canal or canals as aforesaid, without such permission, or in a manner different from the mode prescribed by said commissioner, shall be fined not less than fifty dollars for each offense and a further fine of twenty-five dollars for each and every day such unauthorized connection or opening shall continue."

Section 768 likewise authorizes the Commissioner to issue the permit and directs him to collect a license fee therefor.

This right to drain into the Chicago river is not irrevocable and may be revoked when the changing needs of the City demand it.

Powers similar to those granted by the legislature and ordinances of the same nature as those in our municipal code are held as a valid exercise of the police power. (McQuillin, *Municipal Corporations*, volume 3 (2nd ed.), section 972 lays down the general proposition. It reads as follows:

"In the interest of public health, general municipal police powers authorize reasonable ordinances designed to protect the water supply from pollution, to prevent the fouling of water in creeks, brooks, ponds, etc., to regulate drains and sewers, and to abate nuisances arising from these sources, * * * Property owners may be required to install and connect water closets with the city sewer system. Connection of buildings with public sewers may be required although a private sewer may exist."

In Illinois in smoke ordinance cases, our courts have held that where the General Assembly granted the power to municipalities "to declare, prevent and abate nuisances on public and private property and the causes thereof" that an ordinance passed under such grant was a proper exercise of the police powers.

Harmon v. Chicago, 110 Ill 400.

McQuillin, *Municipal Corporations* (2nd ed.) sec. 974.

Chicago v. Dunham Towing and Wrecking Company 161 Ill App 307, and 175 Ill App 549.

Glucose Refining Co. v. Chicago 138 Fed 209.

The fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the law or ordinance is not a legal, valid objection. [McQuillin, *Municipal Corporations* (2nd ed.) sec. 972.]

It would be proper on your part to revoke any permit granted to drain into the Chicago river; if no permit is granted to request the violator to discontinue the practice; to require sewers emptying from private property to connect with City sewers. The proper procedure to follow would be to serve the violator with personal notice to discontinue the practice.

SPECIAL PERMIT FOR REPAIRS TO DOCK

(No. 9406—Commissioner of Public Works—C.N.—January 21, 1937—31½ pp.)

The Commissioner of Public Works may in his discretion issue a special permit for repairs to a dock line upon which there have been material encroachments over a long period of time, but the permit should embody comprehensive reservations protecting the City's interest.

Citation: Code '31: 2876.

OPINION OF FOREGOING SYNOPSIS

Your letter of January 12, 1937, supplementing your communication of December 18, 1936, with exhibits not previously submitted to us relating to the present status of the ordinance of June 11, 1869, establishing dock line for the south fork of the south branch of the Chicago river north of 35th street, has received our careful consideration.

You say the question now arises as to whether a special permit covering repairs and reconstruction of dock line should be issued by your department and "if so, what should its form be, including all requirements and restrictions which the Law department deems necessary to adequately protect the interest of the City?"

An examination of the plat submitted with your enclosures discloses that in many instances what appear to be material encroachments upon the dock line as established in the original ordinance have been made from

time to time. These have had the general effect of shortening the width of the Chicago river and there is no way of ascertaining from the plat as to how many of these apparent encroachments were deliberate, and which encroachments, if any, have been due to natural accretion and recession during the sixty-seven years which have elapsed since the ordinance was originally passed. We respectfully call your attention to section 2876 of the Revised Chicago Code of 1931 which reads as follows:

"2876. *Duty of harbor master to report encroachments.*) It shall be the duty of the harbor master to report to the city engineer any and all encroachments upon the harbor lines as now established or which may hereafter be established, and thereupon the said harbor master and city engineer shall take such action as may be necessary to enforce the provisions of this article and to remove or cause to be removed any such obstruction or encroachment. If it shall be found that any pile, stone, timber, earth, dock, bridge, or other obstruction whatever, has been placed in any part of the harbor in violation of the provisions of this chapter and that the person who has placed same or caused it to be placed therein refuses or neglects to remove such obstruction upon being requested so to do by the harbor master, city engineer, or commissioner of public works, the harbor master, city engineer, or commissioner of public works, shall have the power, and it is hereby made their duty, to proceed forthwith to remove such obstruction and to charge the expense of such removal to the person who placed such obstruction in the harbor, or caused it to be so placed, and the imposition of any fine or penalty hereby provided for against any person obstructing the harbor shall not be held to exempt any such person from a recovery by the city of the cost of removing any such obstruction."

From the facts before us we have no means of ascertaining what considerations prompted the City authorities to permit what, from the plat submitted, now appear to be encroachments. Nor are we in a position to hazard the full legal status or probable consequences. Respecting the property rights there is no tangible showing of interest other than that of the applicant for the permit.

In view of these facts it is of the utmost importance that your departmental practice of inserting comprehensive reservations in permits granted for operations of this type should be continued. This may be done on your regular form P.W.F. 38 with reservation No. 3 frankly acknowledging the encroachment and stating that the permit is not to be construed to the prejudice of the city of Chicago in the enforcement of the ordinance dock line in the future. Reservation No. 1 stipulating against interference with navigation, the stability of docks and piers or impairing rights of the City

or the State, and reservation No. 2 requiring (the applicant) to hold the City and other municipal interests harmless against all claims for damages should of course be retained.

The question as to whether in view of the long years which have elapsed without interference by any official body or legal action by a private interest a claim of title to the land by adverse possession will serve to preclude assertion of the public rights cannot be determined at this time.

The question whether you should issue or refuse to issue a permit for the work described is a matter for you to determine. The City will not be prejudiced further than it has been by its long acquiescence in the present physical character of the river course, if a permit, with the reservations referred to, is issued.

CHAPTER VII

PUBLIC UTILITIES

A. RAILROADS

RIGHTS AND POWERS OF CITY OVER RAILROADS

(No. 9132—*Chairman, Subcommittee on Streets and Alleys—J.F.G.—April 21, 1936—6½ pp.*)

Neither the City nor the railroads may any longer enforce any of the provisions of the track elevation ordinances.

The City authorities, if they deem it to the best interest of the City, may stop encroachments upon its streets and other public ways by track elevation construction, and reclaim the use of such streets and public ways as are not yet obstructed by railroad embankments, unless these streets and public ways have been vacated by an ordinance other than a track elevation ordinance. However, the right to the possession of streets and public ways within the abutments of elevated railroad rights of way constructed before and since the Public Utilities act became effective may not be disturbed by the City.

The City may not interfere with the switching service of the railroads, and the railroads are not permitted to abandon that service without the approval of the Illinois Commerce Commission.

The right of the City to compensation under ordinances authorizing the construction of elevated or switch tracks is governed by the particular grant of authority under which the tracks are maintained. If the grant of authority providing for compensation has expired, the City has no right to further compensation although maintenance of the tracks may be continued.

If streets and public ways of the City are occupied by a railroad without any authority from the City prior to January 1, 1914, when the Public Utilities act became effective and without any authority from the Public Utilities Commission or the Illinois Commerce Commission since January 1, 1914, the City

may apply to the Illinois Commerce Commission for an order to remove the tracks from those streets and public ways which are unlawfully occupied.

Citations:

Statute: ISBS '35, 111a: 65(1), 77.

Ordinances: Track elevation ordinance, April 5, 1911, sec. 9a, 16.

Cases: Chicago v. Illinois Commerce Commission, 356 Ill 501 (1934).
City of Geneseo v. Illinois Northern Utilities Company, 363 Ill 89 (1936).

OPINION OF FOREGOING SYNOPSIS

We have your letter of March 27, 1936, in which you state that it is your understanding that the Supreme Court of Illinois declared invalid all ordinances of the city of Chicago providing for the elevation of the tracks of railroad companies passed since the enactment of the Public Utilities act. You request our opinion as to whether or not the invalidation of the ordinances mentioned restored to the City the title to streets vacated by the same ordinances.

In another letter of the same date you refer to an order passed by the City Council on May 22, 1935, directing the Commissioner of Public Works to take necessary action to cause the removal of all tracks, fences, etc., now maintained by the C. B. & Q. R. R. Company upon sundry streets and alleys adjoining the right of way of said railroad; that the railroad company was notified of the order of the Council and that it has failed to comply with said order; that the railroad company has taken the position that some of the stub ends of the streets referred to in the order were vacated by the track elevation ordinance of January 24, 1898; that the portions of the streets and alleys referred to in the order of the City Council of May 22, 1935, are those which prior to the elevation of the tracks of the railroad company were occupied by switch tracks leading from the main tracks and right of way of the railroad company to private property devoted to industry beyond the line of the right of way of the railroad company and, we assume, across the streets in question; that it is claimed by the railroad company that the track elevation ordinance of January 24, 1898, vacated those portions of the streets crossed by the switch tracks. You ask for our views in this matter.

In *City of Chicago v. Commerce Commission*, 356 Ill 501, our Supreme Court held (p. 510):

"When the Public Utilities act came into force on January 1, 1914, the power of the city over grade separations ceased to exist, and thereafter it could neither pass new nor enforce existing ordinances with reference to matters within the exclusive jurisdiction of the commission."

We do not construe the foregoing decision of our Supreme Court as having the effect of invalidating all track elevation ordinances. The rights granted to the railroads and accepted by them prior to January 1, 1914, when the

Public Utilities act became effective cannot be withdrawn by the City unilaterally.

The ordinance involved in *City of Chicago v. Commerce Commission*, *supra*, was that authorizing and permitting the Illinois Central Railroad company, the New York, Chicago, and St. Louis Railroad company, the Pullman Railroad company, the Chicago and Western Indiana Railroad company, the Belt Railway company of Chicago, the Chicago, Rock Island, and Pacific Railway company, the Michigan Central Railway company, and the Kensington and Eastern Railroad company, respectively, to elevate the plane of certain of their railway tracks within the city of Chicago, passed April 5, 1911, and amended by an ordinance passed July 15, 1924.

Section 16 of the ordinance referred to provides in part as follows:

"All streets, avenues and alleys crossing or extending into the rights of way of the several railroad and railway companies which are hereby authorized and permitted to elevate their tracks, within the limits hereinbefore specified for such elevation, except streets and avenues at which subways are to be provided by the terms of this ordinance, shall be and the same are hereby vacated insofar as they extend within said rights of way as said rights of way shall be shown upon the plans hereinabove referred to in the second clause of Section 13 of this ordinance. And the City of Chicago shall at any time take any proceedings essential to perfect such vacations."

On January 24, 1898, the City Council passed an ordinance requiring the elevation of the plane of the roadbed of the Chicago, Burlington, and Quincy Railroad Company, the Chicago and Northwestern Railway company, the Chicago Terminal Transfer Railroad company, the Pittsburgh, Cincinnati, Chicago, and St. Louis Railway company, the Union Stock Yards and Transit company, and the Atchison, Topeka, and Santa Fe Railroad company. By section 9a of the foregoing ordinance, it is provided:

"All ordinances heretofore passed for opening streets across any portion of the right of way or yards, of any of the railway or railroad companies mentioned in this ordinance, where the tracks are required to be elevated as in this ordinance provided, are hereby repealed, except in those cases where the streets ordered opened have already in fact been opened and traveled and has become a lawful and existing highway, not hereby vacated, with exception of South Forty-fourth avenue, where a subway is to be built, in accordance with the 'Schedule of Subways,' in this ordinance contained, and any and all portions of any streets, alleys or avenues now existing and crossing either of the lines of railways or railroads within the limits in this ordinance provided for, the elevation or depression of such company's roadbeds is hereby discontinued and vacated with the limits of such company's right of way, except the parts of streets, alleys and avenues required to be occupied by subways, or where this ordinance required a grade crossing to be provided."

The result of the decision in *City of Chicago v. Commerce Commission*, *supra*, is to deny to both the City and the railroads the right to enforce any of the provisions of the track elevation ordinances. The City authorities

may, if they deem it to the best interest of the City, stop encroachments upon its streets and other public ways by track elevation construction and reclaim the use of such streets and public ways as are not yet obstructed by railroad embankments unless heretofore vacated by ordinance other than the track elevation ordinances. Barricades, fences, and structures other than railroad embankments supporting tracks which shut out from public use streets and other public ways which have not been vacated by ordinance other than the track elevation ordinances may be removed by the City authorities and reclaimed for public travel. However, the right to possession of streets and public ways within the abutments of the elevated railroad rights of way constructed before and since the Public Utilities act became effective may not be disturbed by action of the City authorities. By order of the Illinois Commerce Commission streets and other public ways may be extended across the railroads' rights of way at the present elevation as a grade crossing or by viaduct over or underpass through such rights of way with an apportionment of the cost of such construction between the railroads and the City as justice may require. (Illinois State Bar Statutes, 1935, chap. 111a, par. 77; *City of Chicago v. Commerce Commission*, *supra*.)

Any claim of the City that title to streets and other public ways within the elevated rights of way of railroads was restored by the decision of the Supreme Court referred to would work to the disadvantage of the City without benefit whatsoever. The City could not cause the removal of the railroad structures and the railroads would be relieved from payment of the taxes on the value of the land projected as a public way.

As to streets and public ways, or parts thereof, occupied by the railroad switch tracks whether at grade or at an elevation, it is immaterial whether those portions of the streets and other public ways so occupied have been vacated. Under the Public Utilities act the City authorities cannot under any circumstances interfere with the switching service of the railroads and the railroads are not permitted to abandon that service without the approval of the Illinois Commerce Commission. [Illinois State Bar Statutes, 1935, chap. 111a par. 64 (1); *City of Geneseo v. Illinois Northern Utilities Co.*, 363 Ill 89.]

What we have said in regard to the lack of power in the City authorities to compel removal of railroad embankments and switch tracks so as to restore to the public the use of streets and public ways occupied by the railroads does not affect the right of the City to compensation under ordinances authorizing the construction and maintenance of such tracks. That is a question which is governed by the particular grant of authority under which the tracks in question are maintained. If the grant of authority providing for compensation has expired, the City has no right to further compensation although maintenance of the tracks may be continued. (*City of Geneseo v. Illinois Northern Utilities Co.*, *supra*.)

If the streets and public ways of the City are occupied by railroads without any authority whatsoever from the City authorities prior to January 1, 1914, when the Public Utilities act became effective and without authority from the Public Utilities Commission or the Illinois Commerce

Commission since January 1, 1914, the City may make application to the Illinois Commerce Commission to order the removal of tracks from such streets and public ways which are maintained without lawful authority. The Illinois Commerce Commission may order the removal of such tracks or authorize their continued maintenance for the service of the railroads as public convenience and necessity require.

RIGHTS OF RAILROAD UNDER TRACK ELEVATION ORDINANCE

(No. 9450—*Chairman, Subcommittee of Committee on Finance*
—*F.V.M.*—*March 8, 1937*—1½ pp.)

The only rights which the Chicago, Burlington, and Quincy Railroad has with reference to the occupancy of public property, such as streets and alleys, under the terms of the track elevation ordinance of September 3, 1907, are to carry all tracks within the full width of its right-of-way over all intervening streets, avenues, or alleys.

Citation: Coun. J. (1907-08), p. 1496 (Track elevation ordinance, par. 13.)

REPEAL OF SWITCH-TRACK ORDINANCE

(No. 9146—*Chairman, Committee on Local Industries, Streets,*
and Alleys—*J.J.S.*—*May 4, 1936*—3 pp.)

The City Council, if it sees fit to repeal the switch-track ordinance and so relieve the railroad of future liability to pay compensation under that ordinance, should repeal the ordinance only on condition that the railroad pay the compensation due up to the date of repeal.

Citations: Coun. J. (1912-13), p. 3510-3542; (1921-22) p. 1652; (1932-33) p. 1652, 1653.

OPINION OF FOREGOING SYNOPSIS

To your letter relative to switch tracks at 43rd and 47th street you attach an ordinance providing for the repeal of a switch ordinance passed January 11, 1922 (*Coun. J.*, p. 1652). Under the provisions of this switch track ordinance the aforesaid tracks at 43rd and 47th streets were constructed at grade. When the Chicago River and Indiana Railroad company elevated its tracks in 1929 as provided by the track elevation ordinance, passed April 22, 1912 (*Coun. J.*, pp. 3510-3542) these switch tracks were removed and other tracks built at an elevation by the railroad company to serve the industries served by the grade switch tracks. The railroad company paid the compensation of \$400 per year until 1932 but has refused payment since that year. The submitted ordinance provides not only for the repeal of the aforesaid switch track ordinance but for the cancellation of warrants issued for collection of compensation subsequent to January 11, 1932.

In your letter you state that it is the desire of your committee to ascertain from the Corporation Counsel whether or not the aforesaid track elevation ordinance carries with it authority for the maintenance of the switch tracks in question without the payment of compensation to the City, and whether the repeal ordinance should be passed.

Your question as to whether or not the track elevation ordinance carries with it authority for the maintenance of the switch tracks at an elevation without payment of compensation to the City has been a subject of controversy between the City and the company for some time. On July 28, 1932 (*Coun. J.*, pp 1652, 1653), the City Council passed an order directing the Corporation Counsel to bring suit to enforce the payment of compensation for the said switch tracks and directing the Commissioner of Public Works to remove the said switch tracks. Following this order a complete investigation of the foresaid switch tracks was made by the Department of Public Works and conferences had on the question of the company's liability to pay compensation. On April 17, 1935, the Corporation Counsel advised the company that it was his opinion that the company was liable for compensation for the switch tracks maintained across W. 43rd and W. 47th streets, and that if a remittance were not made of the amount of the then due compensation, suit would be started.

Upon receipt of our letter threatening suit, the representatives of the railroad stated that they would take up the question of compensation and repeal of the switch track ordinance for Council action and asked to keep the matter *status quo* until the Council had an opportunity to give it consideration. We granted the request of the railroad company and are awaiting determination of its proposal to have the switch track ordinance of January 11, 1922, repealed.

We are of the opinion that a repealing ordinance which carries with it a cancellation or release of claim for compensation for privileges enjoyed by the railroad in the past is questionable from a legal standpoint. In view of the exacting controversy it would be proper for the City Council if it sees fit, to repeal the ordinance of January 11, 1922,

and thereby relieve the railroad of future liability to pay compensation under that ordinance upon condition that the railroad pay forthwith the compensation due to date of repeal.

* * * * *

RIGHTS OF RAILROADS USING UNION STATION IN SOUTH CANAL STREET

(No. 9074—*Commissioner of Public Works—J.F.G.—February 24, 1936—5½ pp.*)

The railroads using the Union Station have the right by ordinance to construct and maintain railroad tracks on the lower level of South Canal street between West Harrison street and West Taylor street.

It is not necessary for the Union Station company or any of the railroads using the Union Station to obtain a new ordinance or an amendment to the ordinance of March 23, 1914, to construct and maintain railroad tracks outside the east forty-foot strip of South Canal street.

In view of the content of the ordinance, the words "on Canal street" in section 1(d) of the ordinance of March 23, 1914, must be interpreted so as not to include the lower level of that street.

Citation: Coun. J. [1913-14], p. 4536. [Ordinance of March 23, 1914, sec. 1(d), 8(8), 8(9)].

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of June 24, 1935, transmitting correspondence between your department and Chicago Union Station company in regard to the location by the Chicago, Burlington and Quincy railroad of three tracks and a proposal to construct two additional tracks on the lower level of S. Canal street between W. Harrison street and W. Roosevelt road. The questions which you propound are as follows:

"1. Have the railroads the right to lay railroad tracks on (the low level) of South Canal Street between Harrison Street and Taylor Street.

"2. Will tracks laid outside the forty foot strip require a new ordinance or an amendment to the present ordinance.

"3. Can the ordinance or 'general ordinances of the City of Chicago'

(Section 1-d) be interpreted to mean that the 'low level' is not *on Canal Street.*"

You say that the general manager of the Chicago Union Station company relies upon subparagraph (8) of section 8 of the ordinance of March 23, 1914, for the right of the Chicago, Burlington and Quincy railroad to maintain the present tracks and to construct the additional tracks referred to.

On the other hand, you claim that section 1 (d) specifically prohibits the construction of railroad tracks in N. or S. Canal street excepting four tracks between Carroll avenue and Fulton street and that use of the lower level of S. Canal street south of W. Harrison street is by subparagraph (9) of section 8 of the ordinance of March 23, 1914, limited to use for express or freight sheds or loading platforms with necessary driveways.

We have carefully examined the provisions of the ordinance of March 23, 1914, referred to in your communication. We find many seeming inconsistencies in these provisions of the ordinance with regard to the uses to which the public streets in the territory defined may be put. These provisions can be reconciled only by applying some of the provisions to the upper level and some to the lower level of Canal street. As a basis for our interpretation of the ordinance we have concluded first, in answer to your third inquiry, that whenever the words "*on Canal street*" are used without qualification they refer only to the level of the street used for ordinary pedestrian and vehicular travel.

Section 1 of the ordinance of March 23, 1914 (*Coun. J.*, p. 4536), contains the general grant of authority to the Union Station company to construct, maintain, use, and operate a railroad passenger station and facilities described in five subparagraphs (a to e, both inclusive).

Subparagraph (a) has reference to the station building and appurtenances bounded on the west by S. Clinton street, on the south by W. Jackson boulevard, on the east by the east curb line of S. Canal street, and on the north by W. Adams street.

Subparagraph (b) refers to the concourse, train sheds, and appurtenances located *within the east curb line* of S. Canal street to the south branch of the Chicago river.

Subparagraph (c) refers to the tracks, buildings, and facilities of every kind upon private property between Carroll avenue on the north and W. 12th street (Roosevelt road) on the south, the Chicago river on the east, and the east line of N. and S. Canal streets on the west.

Subparagraph (d) refers to express and mail buildings, etc., tracks and facilities upon the streets and alleys within the limits described in the preceding subparagraph (c), but adds a proviso

" * * that the permission and authority *in this ordinance conferred* shall not permit The Union Station Company to construct, maintain, use or operate any track or tracks *on North or South Canal streets,*

except in the block between Fulton street and Carroll avenue, where the use shall be limited to four main tracks and a siding, or to construct, maintain, use and operate any track or tracks in or along any street or streets extending in an easterly and westerly direction, except for the purpose of crossing such street or streets, * * *."

Subparagraph (e) refers to two of the tracks which shall be constructed as through connecting tracks.

The words "in this ordinance" used in the proviso of subparagraph (d) of section 1 would indicate that the proviso is a limitation upon the permission and authority granted by any section of the ordinance and not a limitation merely upon the authority granted by section 1 of the ordinance. Applying the words "on Canal street" to the lower level of said street the proviso would not only limit the use of the lower level of Canal street as provided by subparagraphs (8) and (9) of section 8 as to exclude the construction of tracks in the spaces defined therein but this proviso would also nullify the conceded right of the Union Station company to construct and maintain tracks in the "train sheds" located in Canal street "within the east curb line" thereof [sec. 1(b)]. The construction of the words "on Canal street" as indicated to include the lower level devoted to the use of the Union Station company would be absurd in the light of the other provisions already referred to.

That the words "on Canal street" used in section 1(d) have no reference to that part of the street underneath the upper level is borne out by the language of subparagraph (8) of section 8 reading as follows:

"* * * provided, however, that The Union Station Company or any railroad company or companies using said station, shall be entitled to use the space *underneath* said twenty (20) foot strip between the present south line of West Washington street and the alley now connecting South Canal street with West Harrison street, including the space *under* a strip equal to said twenty (20) feet extended across all intersections of streets from West Washington street to said alley (being part of the east forty (40) feet of said street, referred to in paragraph 1 of Section 6 hereof) *and all the space underneath South Canal street* between the south line of West Harrison street and the north line of Taylor street, including the space under all street intersections of South Canal street with east and west streets between said points so as to permit the use of said space as a continuous strip of ground, upon condition that The Union Station Company shall support and maintain the roadway and sidewalks over any and all such space so used and occupied by it or any railroad company or companies using said station * * *."

Also by the language of subparagraph (9) of section 8 which reads as follows:

"* * * Any space utilized by The Union Station Company or such railroad company or companies *underneath* South Canal street between the south line of West Harrison street and the north line of Taylor street, including the space *underneath* street intersections

between said points, shall be utilized in such a manner as to afford convenient access to any facilities located within said space for the receipt and delivery of freight, from Mather and Forquer streets and Gilpin place. *If any railroad tracks are extended to lands west of South Canal street the same shall be covered by substantial buildings adapted to the purpose for which the same may be built upon any lands west of the west line of said street. * * **

We therefore conclude (1) that the railroads have the right to construct and maintain railroad tracks on the lower level of S. Canal street between W. Harrison street and W. Taylor street. (2) It is not necessary for the Union Station company or any railroad or railroad companies using said station, to secure a new ordinance or an amendment to the present ordinance to authorize them, or any of them, to construct and maintain railroad tracks outside the forty foot strip referred to in your letter. (3) The words "on Canal street" in section 1 (d) of the ordinance of March 23, 1914, must be interpreted so as not to include the lower level of said street.

ENFORCEMENT OF RAILROAD SUBWAY LIGHTING ORDINANCE

(No. 9442—Acting Commissioner of Streets and Electricity—
J.J.D.—March 3, 1937—5 pp.)

The City does not have power to require a railroad to increase the lighting of a subway under its tracks nor to furnish additional lighting and collect for the additional energy so consumed. The City lost its power to enforce the subway lighting ordinance with the passage of the Public Utilities act. A proceeding before the Illinois Commerce Commission would be a proper and adequate remedy to improve the inadequate lighting of the subway.

Citations:

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|-------------|---|
| Statute: | Public Utilities act (1921), sec. 57. |
| Ordinances: | Track elevation ordinance, sec. 12.
Code '97: 1756. |
| Cases: | Northern Trust Company v. Chicago Railways Co., 318 Ill 402 (1925).
Chicago v. Pennsylvania Co., 252 Ill 185 (1911). |

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your inquiry concerning inadequate lighting facilities in the Chicago and Western Indiana railroad subway located at 45th street and Stewart avenue and also your request to be advised if in our opinion it would be within the province of the City, in view of the refusal of the company to increase the lighting in this particular subway, to notify the railroad company that the City was about to proceed to operate these lights on a twenty-four hour schedule and bill the railroad company on this basis and to collect for the additional energy so consumed.

The Track Elevation ordinance which authorized the railroad company to construct the subway, contained the following provision with reference to lighting facilities in said subway:

"Section 12. That the said railway company shall be required to light subways hereinbefore authorized to be constructed in the manner prescribed by ordinances now in force for the lighting of the portion of their tracks at street crossings." (*Coun. J.*, pp. 1394-1492, October 23, 1899).

The lighting ordinance referred to in the foregoing section reads as follows:

"Section 1756. *Lights at crossings.*) All steam railroad companies and all street railway companies, whether such street railways be operated by cable, electricity, horse power or otherwise, whose track or tracks cross or intersect at grade any of the streets within the limits of the city of Chicago, shall and they are hereby required to provide at their own expense proper and sufficient lights and care for the same at all such crossings or intersections. Such lights shall be of such kind as may be approved by the commissioner of public works: Provided, however, that the provisions of this section shall not require a light to be placed at any crossing where the commissioner of public works shall deem the same unnecessary by reason of such crossing being already lighted." (Revised Chicago Code of 1897, page 372.)

We note from the correspondence submitted that the Commissioner of Public Works has "received many complaints concerning the inadequate lighting in the viaduct at 45th street and Stewart avenue" and that "an investigation of the matter discloses the fact that the complaints are definitely justified." It is therefore apparent that public convenience and necessity require additional lighting facilities in the subway referred to. This phase of the matter leads us to a consideration of the Illinois Commerce Commission act.

The Track Elevation ordinance, under whose terms the subway was constructed, was passed by the City Council in the year 1899. The ordinance referred to therein pertaining to lighting facilities was passed about the year 1897. It is significant that both ordinances were passed prior to and were in effect at the time the original Public Utilities act became law (approved June 30, 1913, effective January 1, 1914). The present act was approved June 29, 1921, and became effective July 1, 1921.

The first section of this latter act created the Illinois Commerce Commission. By the eighth section of this law general supervision of all public utilities was vested in the Commission. Section 57 thereof gives the Commission power

*"To require every public utility to maintain its equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public and to this end prescribe among other things the installation, use, maintenance and operation of appropriate safety or other devices * * * and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand."*

While it may be conceded that the ordinance in question would under ordinary circumstances create a proper basis for the enforcement by the city of its provisions requiring the railroad company to furnish adequate lighting facilities in the subway referred to, our Supreme Court has held that the Illinois Public Utilities act supersedes the City's authority in this respect and that the former body has exclusive jurisdiction of the subject matter of the present controversy.

In the case of *Northern Trust Company v. Chicago Railways Company*, 318 Ill 402, at page 409, a proceeding in which a City ordinance passed prior to the enactment of the Public Utilities act, was involved, the court held that:

"The act of 1913 expressly provided for hearings by the commission concerning matters relating to public utilities and the making of rules, regulations or orders as the result of such hearings. Every public utility was required to obey such rules, regulations or orders, and penalties were prescribed for non-compliance. The commission had the power, after a hearing, to determine safe, proper and adequate equipment and facilities and by its order to require them to be employed. It was authorized to direct the making of improvements in the existing equipment or facilities of any public utility when reasonably necessary to promote the security of the public. The commission had the power to require every public utility to maintain and operate its equipment in such a manner as to promote and safeguard the public safety, to prescribe the installation, use and maintenance of appropriate safety devices or appliances, and to require the performance of any other act which the public safety might demand. The act charged the commission, so far as the operation of a public utility in the streets of a city was concerned, with the duty of protecting and promoting the safety of the public, and vested in the commission plenary power to perform that duty."

"The General Assembly, in its discretion, withdrew from cities and villages the power sought to be exercised by the passage of the ordinance of December 28, 1914, and vested it in the Public Utilities Commission, another agency of government, by the original Public Utilities act effective on the first day of January, 1914. (Laws of 1913, p. 459.) For that reason the ordinance was void and should not have been admitted in evidence.

"When the first Public Utilities act came into force, on January 1, 1914, the power of the city over the subject matter of that act ceased to exist, and *it could not thereafter pass new ordinances or enforce existing ordinances* with reference to matters within the exclusive jurisdiction of the Public Utilities Commission * * * A municipality cannot be said to possess the power to enforce an ordinance concerning a subject upon which it has lost the power to pass the ordinance. * * * The power of the city over the subject of the regulation of the equipment of public utilities ceased to exist when that act became effective, on January 1, 1914, and if the ordinance of 1911 required street cars to be equipped with brightly lighted headlights it was abrogated on that day and thenceforth became unenforceable."

In view of the above opinion and replying to your inquiry it is clearly apparent that it is not "within the province of the City, in view of the refusal of the railroad company, to increase the lighting of this particular subway" and to successfully sustain an action at law to collect for the additional energy so consumed.

The railroad company bases its refusal to furnish additional lighting upon the authority cited in the case of *City of Chicago v. Pennsylvania Railroad Company*, 252 Ill 185. We do not believe this opinion is controlling in the present case for the reason that it was decided prior to the enactment of the Public Utilities law (December, 1911) and therefore did not contemplate a proceeding before the Illinois Commerce Commission, which body has since that date acquired jurisdiction.

While in our opinion the City has lost its power to enforce the terms of the subway lighting ordinance, we believe that a proceeding before the Illinois Commerce Commission would be a proper and adequate remedy to eliminate the conditions complained of in your letter.

* * * * *

REGULATION OF TRAIN SPEEDS

(No. 9062—Alderman, 41st Ward—J.J.D.—February 21, 1936
—2 pp.)

The City has no power to regulate the speed of trains within the City as the enactment of the Public Utilities act deprived the City of any authority to enforce ordinances relating to public utilities. The penalty in the Revised Chicago Code of 1931 for violation of speed limits by railroads is not enforceable. Redress may be had by instituting a proceeding before the

Illinois Commerce Commission requesting a reduction of the speed of trains within the City.

Citations:

Statute: Public Utilities act.

Ordinance: Code '31: 1142, 1144.

Case: Chicago Motor Coach Co. v. Chicago, 337 Ill 200 (1930).

OPINION OF FOREGOING SYNOPSIS

Replying to your inquiry regarding section 1142 of the 1931 City Code with reference to the speed of trains within the territorial limits of the city of Chicago, as to whether or not a penalty is provided for the violation of said Code and if said penalty is enforceable, you are advised that section 1144 of the Revised Chicago Code of 1931 provides for such a penalty and reads as follows:

"1144. *Penalty.*) Any person or corporation owning or operating any steam railroad within the city, that shall by himself or itself, or by or through any of his or its agents, servants or employes, or any other person violate, fail or neglect to observe any of the provisions of this article, shall, for each violation, failure or neglect to observe the same, be fined not less than twenty-five dollars nor more than two hundred dollars, excepting in such cases where some other penalty has been specifically provided in this article."

Answering your further inquiry as to whether or not the aforesaid penalty is enforceable, the Supreme Court of the state of Illinois has decided that the enactment of the Public Utilities law, effective January 1, 1914, deprived the city of Chicago of any authority to enforce an ordinance such as the one above referred to, and held that jurisdiction in a matter of this kind rested with the Illinois Commerce Commission.

In the case of *Chicago Motor Coach Company v. City of Chicago*, 337 Ill 200, at page 209, in passing upon a question of this character the court said:

"The language of the act is sufficiently comprehensive to subject every phase of the relations between every public utility and the public to the supervision and regulation of the Public Utilities Commission. * * * These provisions certainly covered the whole field of service of every utility. *They left no room for the exercise of authority of any other body. The vesting of the power conferred by this act in the Public Utilities Commission necessarily withdrew from cities and villages all such power as they may have previously been authorized to exercise in the premises.*"

We are therefore of the opinion that the penalty referred to is not enforceable by the City, but that redress may be had by instituting a proceeding before the Illinois Commerce Commission, requesting a reduction of the speed of trains in the territory referred to in your letter, if that is the relief sought by you in this instance.

* * * * *

B. CHICAGO TUNNEL COMPANY, COMMON-
WEALTH EDISON COMPANY, AND
OTHER PUBLIC UTILITIES

COMPENSATION FOR STEAM TRANSMISSION
BY CHICAGO TUNNEL COMPANY

(No. 9004—City Comptroller—J.F.G.—January 8, 1936—21½ pp.)

While the Chicago Tunnel company is not authorized to transmit steam through its tunnels, the amount realized for the transmission of steam by the Chicago Steam corporation, an affiliate of the Chicago Tunnel company, both of which affiliates are wholly owned by the Chicago Tunnel Terminal corporation, is a part of the gross income derived from the use of the tunnels, and the City is entitled to six per cent of that income for the use and occupancy of the tunnels regardless of whether that use and occupancy is lawful or unlawful.

In any demand upon the Chicago Tunnel company for additional compensation for the use of the tunnels to transmit steam, it should be made clear that the City is not sanctioning that use of the tunnels nor confirming or ratifying any other unauthorized use of the tunnels by the Chicago Tunnel company, by any of its affiliates, or by any licensee or sublessee of the Chicago Tunnel company.

Citations:

Ordinance: Chicago Tunnel Company ordinance, July 19, 1932, sec. 1, 2, 11.

Other reference: 18 Op. Corp. Coun. 630 (No. 8613).

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of December 16, 1936, in which you state that an audit of the books and records of the Chicago Tunnel company to check the compensation payments under the ordinance of July 19, 1932, discloses that during the year ending September 30, 1936, the Chicago

Tunnel company received \$7,921.44 for the transportation of steam, and the City received \$1,188.24 for compensation from this source.

As you point out in your letter, section 11 of the ordinance granting rights to the Chicago Tunnel company provides that the company, during the term of the grant, etc., shall pay quarter-annually to the City as rent and compensation for the use and occupancy of the tunnels a sum equal to (a) three cents per car of bulk freight, (b) three cents per ton of package or parcel freight "(c) six per centum of the gross receipts derived from any use of the tunnels not included in subdivisions (a) or (b) of this section."

In an opinion rendered by this department to the Hon. Frank E. Konkowski, chairman, subcommittee of the Committee on Utilities, dated January 4, 1935, (Opinion No. 8613), we held that under the ordinance of July 19, 1932, Chicago Tunnel Company was not authorized to use the tunnels for the transmission of steam because the transmission of steam is not included within the definition of the words "tunnel system" in subdivision (e) of section 1 which the grantee company, by section 2 of the ordinance, was given permission and authority to maintain and operate. We then said:

"* * * Steam, in our opinion, does not fall within any of the classes of articles authorized to be conveyed, transported, transmitted, received and delivered. It is certainly not bulk freight. It is certainly not package or parcel freight, and it is certainly not mailable matter.
* * *

It is clear, therefore, that the compensation to the City for the use of the tunnels in the transmission of steam on the basis of three cents per ton is not warranted by section 11 of the ordinance.

While we have held that the Chicago Tunnel company is not authorized to engage in the business of transmitting steam via the tunnels, the amount realized by Chicago Steam corporation, an affiliate of the Chicago Tunnel company, both of which affiliated companies are wholly owned by Chicago Tunnel Terminal corporation, is a part of the gross income derived from the use of the tunnels, and by virtue of subdivision (c) of section 11 of the ordinance, the City is entitled to six per cent of the gross receipts of the Chicago Steam corporation from this source for use and occupancy of the tunnels whether such use and occupancy is lawful or unlawful.

An arbitrary separation of the income from transmission of steam via the tunnels between Chicago Steam corporation and Chicago Tunnel company is not permissible under the terms of the ordinance. The two companies being one hundred per cent affiliates, do not deal with one another at arm's length and, for the purpose of determining the amount of compensation due to the City, Chicago Steam corporation and Chicago Tunnel company should be treated as one.

In any demand made upon Chicago Tunnel company for additional compensation on account of the use of the tunnels for transmission of steam it should be made clear that the City is not thereby sanctioning the

use of the tunnels for the purpose nor confirming nor rectifying any other unauthorized use of the tunnels by the Chicago Tunnel company or any of its affiliates or any license or sublessee of the Chicago Tunnel company.

PAYMENT OF COMPENSATION BY COMMONWEALTH EDISON ON CERTAIN GROSS RECEIPTS

*(No. 9637 — City of Comptroller — J.F.G. — October 13, 1937—
11 pp.)*

Commonwealth Edison company is required by its franchise ordinance of 1908 to pay to the City an amount equal to three per cent of its gross receipts from all electricity sold by it within the City and from all of its plants operated in the City. Receipts from lamp renewal service, from fuel charges to other generating companies which exchange electrical energy with Commonwealth Edison company, from charges for converting alternating current to direct current, and from charges for the maintenance of equipment owned by the company as distinguished from equipment owned by its customers, are part of the gross receipts of Commonwealth Edison company.

Meters which are used to determine the charge which Commonwealth Edison company should make to the customer are a part of the company's equipment. Meters which are used by the customer for his own purposes, whether owned by Commonwealth Edison company or by the customer, cannot be considered a part of the company's equipment, and any rental or maintenance charges received by the company for those meters are not a part of the gross receipts of the company.

Citations:

Ordinance: Hoover, Special Ordinances, p. 91, sec. 3.

Case: Consumers' Coffee Stores v. Illinois Commerce Commission, 348 Ill 615 (1932).

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of August 2, 1937, transmitting a letter from the Comptroller of Commonwealth Edison company dated July 10, 1937, in which payment of warrant for collection No. F-1107

amounting to \$8,007.75 was declined. The warrant covers claim of the City for compensation on items of revenue of the Commonwealth Edison company for the year ending May 31, 1936. The items in controversy are:

1. Lamp renewal charges of 15 cents per K.W.H., \$1,543,228.57.
2. Amount received from Public Service Company of Northern Illinois for energy supplied under interchange energy contract, \$430,109.70.
3. Amount received from Chicago Railways company, Chicago City Railway company, and Chicago Rapid Transit company for conversion service furnished to them from substations of Commonwealth Edison company, \$195,318.60.
4. Rental from meters leased by Commonwealth Edison company to its customers and also maintenance charges paid by customers on company-owned and customer-owned equipment, \$96,039.25.

The warrant for collection is for three per cent of all four items of receipts above named. The basis of the warrant for collection is section 3 of an ordinance passed March 23, 1908, accepted April 13, 1908, continued in force after its expiration by subsequent ordinances accepted by Commonwealth Edison company. Said section 3 appears at page 91 of Hoover's *Special Ordinances of the City of Chicago* and is as follows:

"Said Commonwealth Edison Company shall pay annually to the City of Chicago an amount equal to three per cent of its gross receipts from all the plants which it shall from time to time operate in said city after this ordinance shall take effect, and from all its sales of electricity which may be distributed, delivered or used in said city at any time, whether such electricity be generated by it or be purchased by it from other sources either within or without said city; but said company shall not be required to pay to the City of Chicago any percentage of gross receipts from sales of electricity neither generated by it nor distributed by it in said city. * * *

Lamp Renewal Charges

By order of the Illinois Commerce Commission entered November 23, 1932, the charges for electricity furnished by the company and the charges for lamp service are required to be separately stated. The charge for lamp service on a kilowatt-hour basis was arrived at by the Commission by computing the amount of money paid by the company for the lamps plus the expense (including overhead) of storing, handling, and delivering the lamps to the customers. There was next ascertained the number of kilowatt-hours furnished by the company to those customers receiving lamp service and the cost referred to was then divided by the number of kilowatt-hours sold. The customer is not compelled to pay the charge for lamp service if he does not desire such service. Notwithstanding the separation of the charge for electrical energy and the charge for lamp service since the entry of the order of the Illinois Commerce Commission on November 23, 1932, the company has never before questioned the City's charge of three per cent of the gross receipts derived from lamp renewal

charges and has continued to pay compensation on this item until the warrant for the fiscal year ending May 31, 1936, was issued.

The Department of Finance of the state of Illinois in a ruling relative to the application of the Public Utility Tax act to the same item of receipts has held that such receipts did not come within the Public Utility Tax act which required the payment of a tax on receipts "for water, gas or electricity supplied or furnished * * * and for all services rendered in connection therewith, including minimum service charges." The Treasury department of the United States made a similar ruling in construing section 616 of the Revenue act of 1932 imposing a tax on electrical energy sold based upon the price for which the energy is sold. These rulings are inconsequential because by the ordinance under consideration the company is required to pay not only on its gross receipts from sales of electricity but also upon its gross receipts "from all the plants which it shall from time to time operate" in the City. The question for us to determine is whether the charges for lamp renewal service when paid become a part of the gross receipts from the "plants" operated by the company.

The lamps involved are the property of the company. The charge for lamp renewal service when made is not based upon the actual number of lamps furnished in renewals to each customer although the number of lamps which the company is required to furnish in renewals to a customer is said to be directly in proportion to the number of kilowatt-hours of electricity used by the customer. The charge is not even based on the consumption of electricity for lighting purposes alone but is spread equally over all electrical energy consumed by all lamp-receiving customers for heat, refrigeration, and other power which have no relation to the cost of lamp renewal service. It would seem that under these circumstances the lamps should be considered just as much a part of the plants of the company as are its tunnels, poles, generators, conduits, wires, switches, converters, transformers, meters, and even office facilities and equipment which form a part of the means for the production, sale, and transmission of electrical energy and the collection of the charges therefor, all of which is paid for by the company's customers in proportion to the number of kilowatt-hours of electrical energy consumed by them.

It had been pointed out, however, that the company assumed our present attitude in the case of *Consumers Coffee Stores v. Illinois Commerce Commission*, 348 Ill 615, and was defeated in its efforts to sustain a rate for lamp service and electric current under a single charge. The court held that by such device (the single charge including a concealed unreasonable charge for lamp service) the company was given a practical monopoly of the lamp business among its consumers to the detriment of other dealers; that such monopoly is unlawful; and that the compulsory combined charge violated the consumer's right to purchase lamps to his advantage and where he desired. Pursuant to the judgment of the court in this case, the order for a separation of charges for electricity and lamp renewal service with the right in the customer to determine whether the lamp service shall be furnished by the company was entered by the Illinois Commerce Commission on November 23, 1932.

We fail to see anything in the court's opinion in the case referred to which affects the City's right to compensation on the company's gross receipts from lamp service charges. The court did not decide that the lamps, which remain the property of the company and are used in consumption of electric current, are not a part of the "plants" operated by the company in the sale and distribution of electricity. The court held the rates charged by the company to its customers unreasonable because it imposed upon its customers a charge for a service which was not exclusively a public utility service. The service, when rendered, is none the less an incident in the operation of the company's plants and the charge made therefor, whether separate from or combined with charges for other services rendered by the Company in furnishing electricity and facilities for the use thereof, when paid, is a part of its revenue from the operation of its plants even though such revenue is no part of the gross receipts from the sale of electricity.

Receipts on Account of Interchange of Energy

We have examined the interchange energy contract between Commonwealth Edison company, Public Service company of Northern Illinois, Northern Indiana Public Service company, and Western United Gas and Electric company dated January 1, 1933. This contract is a substitute for a similar contract dated February 1, 1925, and agreements supplemental thereto.

One of the reasons for the interchange of energy between the companies named is disclosed in the recitals forming the inducement for the contract. It seems that certain areas of territories in which the four companies operate are at considerable distances from the generating stations of the company operating therein, and such company can supply energy to consumers more cheaply by procuring it from a neighboring station of one of the other companies than by producing it at a station of its own and transmitting it therefrom. Other reasons for interchange of energy by interconnection of the respective systems of the four companies are also disclosed in the recitals of the contract. Demand charges and fixed operating charges are made for energy supplied to the interconnected systems. No question is raised as to the compensation for such demand charges and fixed operating charges.

The only question submitted to us is whether the City is entitled to compensation on fuel charges required to be paid to Commonwealth Edison company for energy supplied to the other companies on account of the proximity of the company's generating stations to certain areas served by the other companies in exchange for energy supplied by the other companies in certain areas in which Commonwealth Edison company operates which are closer to the generating stations of the supplying companies. The instance cited is that of the Public Service company of Northern Illinois which supplies energy to Commonwealth Edison company for use by the latter's customers in the north side of Chicago in exchange for an equivalent amount of energy supplied by Commonwealth Edison company to the Public Service company for use by its customers in the west suburbs of Chicago. For such interchange of energy the companies

charge each other their respective fuel costs in producing such energy. It is said that the transaction is not a sale of power but is actually an exchange of electricity between the two companies; that it is in effect an exchange of kilowatt-hours; and that no element of profit enters into the transaction, but rather it is a bookkeeping method of accounting for exchange of electricity.

It has been argued by Commonwealth Edison company that it pays compensation to the City on the gross receipts derived from the sale of the electricity received from the Public Service company and therefore the City, without being paid compensation on the reimbursement of fuel costs, receives the same amount of compensation it would be paid if Commonwealth Edison company did not furnish electricity on an exchange basis to the Public Service company; that if Commonwealth Edison company were to pay compensation to the City on the amount of such fuel costs for which Commonwealth Edison company is reimbursed by the Public Service company, it would be paying compensation twice to the City for the fuel costs of the electricity involved in this exchange.

We are not concerned with the question as to whether the transaction is for profit or is merely for convenience. The ordinance imposes the obligation to pay compensation on gross receipts from the operation of the plants of Commonwealth Edison company and from the sale of electricity. It makes no allowance for any costs of operation of Commonwealth Edison company and does not require the payment of compensation for fuel costs paid to the Public Service company. There is no duplicate payment of compensation on gross receipts involved in the payment of compensation on fuel costs for electrical energy supplied to the Public Service company.

The arrangement for interchange of energy apparently has been operative for many years and Commonwealth Edison company has paid compensation upon the amount of its reimbursement of fuel costs in supplying energy to the Public Service company. The reasons urged by Commonwealth Edison company for discontinuing payment of compensation on that account may be proper for the consideration of the City Council in a request for a reformation of the contract ordinance. Strictly speaking, the charges for energy supplied to the Public Service company, when paid or settled, are receipts from operation of Commonwealth Edison company's plants, and there is no legal basis for relieving Commonwealth Edison company of the payment of compensation on these charges under the terms of the ordinance referred to.

Receipts on Account of Conversion Service Furnished to Local Transportation Companies

We have examined an agreement dated May 31, 1913, between Commonwealth Edison company and the Northwestern Elevated Railroad company covering the subject matter under consideration which is said to be in all respects similar to contracts between Commonwealth Edison company and each of the local transportation companies involved.

By the terms of the agreement, Commonwealth Edison company undertook to supply the railway company direct current instead of alternating current energy then required to be delivered at certain generating stations and substations of Commonwealth Edison company, some of which have been leased from the railway company. To that end, Commonwealth Edison company is required to convert alternating current energy into direct current energy and to provide, operate, and maintain such substation equipment as may be necessary for such conversion service. The railway company is obligated to pay additional charges based on its maximum demand of direct current energy to be converted from alternating current energy.

Since the item in dispute was received by Commonwealth Edison company from its operation of plants owned or leased by it, this item must fall within the category of "gross receipts from all of the plants which it shall from time to time operate in said City" and Commonwealth Edison company is liable for the payment of compensation thereon.

Rentals of Meters and Maintenance Charges on Equipment

It is not clear from the description in your letter of August 2, 1937, whether the item of receipts under this heading is limited to meters or whether it includes other equipment. If the equipment referred to is used for consumption of electrical energy it becomes important to determine whether such equipment is company-owned or customer-owned. If company-owned, it is part of its plants and the City is entitled to compensation on the gross receipts not only from the charges for electricity consumed thereby but also from the charges for maintenance thereof. If such equipment is customer-owned, it cannot be said to be any part of the plants of the company and the maintenance thereof is not, in our opinion, a utility or plant operation. The City is not entitled to any compensation for any charges for such maintenance.

Meters are used for measuring the quantity of electrical energy consumed. If the meters are used to determine the charges which the company should make to the customer they are a part of the company's plants. Meters which are used by the customer for his own purposes, such as measuring electricity used in various departments or branches of the customer's business for interdepartmental cost accounting purposes, whether owned by the company or owned by the customer, cannot be considered a part of the company's plants and any rental or maintenance charges received by the company for such meters are not, in our opinion, subject to the provision for the payment of compensation to the City.

COMPENSATION DUE FROM COMMONWEALTH EDISON COMPANY IN CONNECTION WITH CENTURY OF PROGRESS EXHIBITION

(No. 9112—City Comptroller—J.F.G.—April 2, 1936—3 pp.)

Receipts from customers to reimburse the Commonwealth Edison company for an estimated amount for electric current stolen plus the expense of investigators in connection therewith are not a part of the gross receipts from any plant of the company and are not subject to compensation to the City.

Receipts from The Century of Progress Exposition to reimburse Commonwealth Edison company on a kilowatt-hour basis for the temporary plant installed by the company to render service to The Century of Progress Exposition are subject to compensation to the City if the receipts are the regular charge made by the company for the current sold to The Century of Progress Exposition. But, if the company charged the Exposition its regular rates and added the amount of the item to reimburse the company for the temporary plant, the receipts are not a part of the gross receipts of the company for which compensation must be paid to the City unless this additional charge exceeded the actual cost of the plant and equipment installed.

Citation: Hoover, *Special Ordinances of Chicago* (1915), p. 91 (sec. 3); p. 108 (sec. 10).

LIABILITY FOR RELOCATING UTILITY EQUIPMENT

(No. 9556—Commissioner of Public Works—J.F.G.—July 12, 1937—2½ pp.)

In letters to public utility companies requesting them to remove and adjust their equipment in public streets which interferes with the installation of City water mains and appurtenances, the paragraph designed, in the event the City is held liable for the cost to the public utilities of removing and adjusting such equipment, to limit the liability of the City to the actual

expense of removal, plus certain overhead charges, is not affected by the recent decision of the United States Supreme Court that the operation of a municipal water system is such a governmental function as to exempt from Federal taxation the salaries of officers and employees engaged in operating a municipal water system.

Citation: *Brush v. Commissioner of Internal Revenue*, 81 L Ed (U. S.) 443 (1937).

FINING OR TAXING OF PUBLIC UTILITY OPERATING AFTER EXPIRATION OF FRANCHISE

(No. 9725—J.F.G.—December 13, 1937—3 pp.)

No city or village in Illinois has any right, power, or authority, directly or indirectly, to impose by ordinance any fine or penalty for the use of public streets by any public utility continuing operations after its franchise has expired unless the Illinois Commerce Commission has ordered the utility to cease and desist its operations, nor may any city tax public utilities unless it has the express power to do so under a special charter.

Citations:

Constitution: Illinois, art. IX, sec. 1, 2, 9, 10.

Statutes: Cities and Villages act.
Public Utilities act.

Cases:

Law v. People, 87 Ill 385 (1877).

Brawn v. Chicago, 110 Ill 186 (1884).

Kocsis v. Chicago Park District, 362 Ill 24 (1936).

Sleight v. People, 74 Ill 47 (1874).

Town of Lebanon v. Ohio and Mississippi Ry., 77 Ill 539 (1875).

City of East St. Louis v. Wehrung, 46 Ill 392 (1868).

Chicago Motor Coach Co. v. Chicago, 337 Ill 200 (1930).

Chicago v. Illinois Commerce Commission, 356 Ill 501 (1934).

City of Geneseo v. Illinois Northern Utilities Co., 363 Ill 89 (1936).

OPINION OF FOREGOING SYNOPSIS

We have your letter of December 2, 1937, asking for our opinion as to the power of a city to pass an ordinance imposing a three per cent gross revenue tax upon all public utilities using the public streets of the city

without a franchise, and whether the city may pass an ordinance imposing a daily fine for any public utility occupying the streets without a franchise.

Neither the city nor any of the officers has any inherent power in governing it, but all of their powers are delegated and limited by the charter and ordinances adopted in pursuance thereof (*Law v. People ex rel.*, 87 Ill 385, 395). The charter of a city in Illinois is the law under which the city is incorporated. Prior to the Constitution of 1870, cities were incorporated by special law and since then they have been incorporated under our general Cities and Villages act. If your city was incorporated by special law it may have powers which are not contained in the general Cities and Villages act. The Cities and Villages act does not grant authority to any city or village to impose any tax upon public utilities which may differ from taxes imposed upon all other persons and corporations.

Article IX of the Constitution of Illinois relates to revenue. Sections 9 and 10 of this article regulate the imposition of taxes by municipalities and the balance of the article relates to state and county taxes (*Braun v. City of Chicago*, 110 Ill 166; *Kocsis v. Chicago Park District*, 362 Ill 24). Section 9 of article IX provides that all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. In determining the validity of municipal taxes, our Supreme Court has, however, applied the principles of sections 1 and 2 of article IX of the Constitution (*Sleight v. People*, 74 Ill 47; *Town of Lebanon v. Ohio and Mississippi Ry.* 77 Ill 539, 541). The power to tax occupations and other subjects otherwise than by valuation of property given by section 2 of article IX of our Constitution may be delegated to municipal authorities (*City of East St. Louis v. Wehrung*, 46 Ill 392). But the legislature has never delegated power to cities and villages by the general act to impose special taxes upon public utilities.

Before the enactment of the Public Utilities act, cities and villages in Illinois had the right and power to regulate the use of streets by public utilities and could exact reasonable compensation from public utilities as a condition for the privilege granted. Upon the adoption of the Public Utilities act the power of cities and villages in this respect was withdrawn (*Chicago Motor Coach Co. v. City of Chicago*, 337 Ill 200; *City of Chicago v. Illinois Commerce Commission ex rel.*, 356 Ill 501). While there may be some question as to whether a public utility may initiate a public service to the inhabitants of a city or village involving the use of its public streets upon securing a certificate of convenience and necessity without the consent of the city or village authorities, there is no longer any ques-

tion as to the right of such utility to continue its public service upon expiration of its franchise rights without consent of the city or village authorities (*City of Geneseo v. Illinois Northern Utilities Co.*, 363 Ill 89).

It is obvious that no city or village in Illinois has any right, power, or authority, directly or indirectly, to interfere by ordinance imposing any fine or penalty for the use of public streets by any public utility continuing operations after its franchise has expired unless the Illinois Commerce Commission has ordered such utility to cease and desist its operations. It is likewise obvious that unless a city has express power under a special charter to tax public utilities no such power exists.

CHAPTER VIII

ZONING AND BUILDING

A. APPLICATION OF ZONING ORDINANCE

BOARD OF APPEALS' POWER TO REVOKE BUILDING PERMITS—"BLOCK" DEFINED—EFFECT OF NON-CONFORMING USE IN REAR OF LOT ON USE IN BLOCK

(No. 9095—*Chairman, Zoning Board of Appeals—L.V.R. and O.F.W.—March 19, 1936—2 pp.*)

A "block" as the word is used in section 28, rule 1, of the Chicago Zoning ordinance includes all property abutting on a street including the entire length of the lots and their improvements lying between the two nearest intersecting or intercepting streets.

A lawfully established non-conforming use in operation on the rear of a corner lot should be considered as a lawfully established non-conforming use in the block.

The Zoning Board of Appeals has power by statute to revoke permits issued by the Commissioner of Buildings in violation of the Zoning ordinance.

Citations:

Statute: ISBS '35, 24: 523.

Ordinance: Zoning ordinance, sec. 28, rule 1.

FRAME BUILDING ERECTED WITHIN CITY FIRE LIMITS

(No. 9482—*Commissioner of Buildings—L.V.R. and G.J.T.—April 9, 1937—1½ pp.*)

In the case of a frame building which is being erected within

the City's fire limits in violation of the City's ordinances, the Commissioner of Buildings should notify the owner, agent, superintendent, or architect of the building, or the contractor erecting the building, that the building violates the City's ordinances. If the notice is not complied with, the Commissioner of Buildings has authority, and it is his duty, to tear down the building, or to cause it to be torn down.

Citation: Code '31: 412-414, 1629, 1702, 1703.

PROTEST OF CONSTRUCTION OF BUILDING FOR COMMERCIAL PURPOSES

(No. 9171—Deputy acting for the Mayor, Department of Buildings—L.V.R.—May 21, 1936—2 pp.)

The Department of Buildings should not issue a permit to construct or maintain buildings for a commercial use in a block zoned for a commercial use but in which a majority of the buildings are used exclusively for residence purposes, if there has been filed with the department a petition signed by not less than ten owners of property used for residential purposes in the block, or by a majority of the owners according to the frontage in case the ownership of the frontage is in less than twenty persons.

Citations: Code '31: 1685.

JUNK YARDS ON TROLLEY-BUS STREET

(No. 9118—Deputy acting for the Mayor, Department of Buildings—L.V.R.—April 8, 1936—3 pp.)

Section 14-A of the Zoning ordinance which prohibits junk yards on streets where there is a street railway line applies to

streets on which a trolley bus service is being operated as a street railway extension.

Citations:

Ordinance: Zoning ordinance, sec. 14-A.

Other reference: 18 Op. Corp. Coun. 561 (No. 8965).

OPINION OF FOREGOING SYNOPSIS

We rendered an opinion on December 11, 1935, on the facts presented at that time. You now state that your attention has been called to the fact that trolley poles and other material has been delivered on the street, and work of installing a trolley line bus extension of the street railway lines is being carried on, and that this is new and additional matter not placed before us in your original request and ask if it is of consequence and has any bearing on the question of establishing and maintaining a junk yard at 5414-20 Northwest highway and wish to be advised if section 14-A of the Chicago Zoning ordinance applies to the above premises.

Said premises are in a manufacturing district and the storage of iron junk, etc., is classed as an M-1 use.

The ordinance is specific as to any street upon which is located a street railway line. In recent times, street railway lines consisted of cars, trolley poles, electric wires, and tracks upon which the cars run.

At present, feeder buses are operated on certain of our streets as an auxiliary means of transportation of passengers over the street railway lines. Some of these feeder buses are motivated by their own power. Others are dependent upon power transmitted by trolley lines which fix the route of the buses within narrow limits on each street when operated almost to the same extent as the use of tracks do.

It is reasonable to assume that the reservation expressed in the last line of the ordinance is based on the fact that the presence of a junk yard is deemed objectionable, because of the danger of pedestrians passing by such places; because of the fact that in the operation of such business it requires the constant egress and ingress of trucks and wagons which tend to block the operation of all kinds of traffic especially street cars which run on rails and feeder buses which are operated by means of trolley poles and electric wires and therefore cannot turn out and go around any obstruction; because there is more traffic on streets on which street cars and trolley buses operate and also because the health and comfort of people in the immediate neighborhood is impaired thereby.

It is evident that the word *operated* could reasonably be substituted for the word *located* in the said ordinance.

Such an interpretation of the clause's meaning, taken in conjunction with the reasoning hereinabove expressed would make apparent that the

ordinance's allusion to street railways carry by implication the same reference to supplementary conveyances of the character of trolley buses.

If the trolley bus service operated on Northwest highway passes by the premises in question and is part of the street railway operation, we see no reason why junk yards on such streets do not come within the ordinance in question.

It is, therefore, our opinion that section 14-A applies in this case and in similar cases where places of business such as a junk yard are located on streets on which a trolley bus service is being operated as a surface line extension.

AUTOMOBILE WRECKING ESTABLISHMENT AS A JUNK YARD

(No. 9163—Zoning Board of Appeals—L.V.R. and O.F.W.—May 15, 1936—2½ pp.)

If a building is used only for automobile wrecking and for the resale of parts of the wrecked automobiles, and those parts are not cast aside as old iron, steel, wood, wire, brass, copper, glass, rubber, or cloth, and allowed to accumulate, the premises are not being used as a junk shop or junk yard so as to be prohibited from being located upon any street on which there is a street railway line.

Citations:

Ordinance: Zoning ordinance, sec. 14-A.

Case: Chicago v. Northern Paper Stock Co., 337 Ill 194 (1930).

OPINION OF FOREGOING SYNOPSIS

We have your communication of May 5, 1936, in which you state that an appeal has been filed with your board from the decision of the Commissioner of Buildings in issuing a permit for the establishment and operation of an automobile wrecking and junk storage shop and yard on the premises at 5414-20 Northwest Highway which it is alleged is in violation of Section 14-A of the zoning ordinance; that on January 3, 1936, the Commissioner of Buildings issued a permit for the erection of a one-story building for auto wrecking and sale of parts and wish to be advised whether the building when erected and the use of premises for automobile wrecking and sale of parts should be construed as a junk shop and a junk yard as mentioned in section 14-A of the Zoning ordinance.

Section 14-A above referred to provides as follows:

"It shall be unlawful for any person, firm or corporation to carry on or engage in the business of keeping a junk store or a junk yard upon any street in the city upon which is located a street railway line."

In the case of the *City of Chicago v. Northern Paper Stock Company*, 337 Ill 194, the Supreme Court in holding that the business of buying sorted rags and papers in bales by loads from dealers in those commodities and the resale of same after sorting, grading, and baling should not be regarded as a junk store or yard under the City ordinance, said:

"In conferring upon cities and villages the power to tax, license and regulate junk stores the General Assembly doubtless contemplated that the power would be exercised with respect to places of business commonly known and understood as such * * *.

"A city may not extend its power by a mere definition. (*Emmons v. City of Lewiston*, 132 Ill. 380). Without a statutory grant of power, the commonly accepted meaning of a junk store cannot be extended by ordinance to include the business of buying rags and paper from dealers in large quantities, sorting and grading them according to quality, and selling them to mills and factories, usually in carload lots. In such a business the materials are not collected, held or sold in the manner practiced by one operating a junk store or yard. A business does not come within the terms of a regulatory measure when the reason for the regulation does not exist. (*Commonwealth v. Ringold*, supra; 2 Words and Phrases (2nd. ser.) p. 1273). The reasons requiring junk stores to obtain licenses do not apply to a business such as is conducted by the appellant, and that business does not come within the grant of power to a city to license junk stores and yards."

If the above described premises are to be used exclusively for automobile wrecking and all the parts taken from same are to be resold, then it is our opinion that this business proposed to be conducted at said above mentioned premises is similar in character to that above described and is not a junk shop or yard as contemplated by section 14-A of the Zoning ordinance, and that no violation of the Zoning ordinance would exist so long as the use of the premises is confined to automobile wrecking and sale of parts. If, however, in the use of said premises certain parts of the wrecked automobiles are cast aside as old iron, steel, wood, wire, brass, copper, glass, rubber, cloth, etc., and allowed to accumulate, then it would be our opinion that said premises should be classed as a junk shop or yard.

B. FRONTAGE CONSENTS

FRONTAGE CONSENTS FOR ALTERATIONS TO FUNERAL HOME

(No. 9123—Deputy acting for the Mayor, Department of Buildings—L.V.R.—April 13, 1936—3½ pp.)

In the case of alterations and an addition to a building which is to be used as a funeral home, frontage consents must be presented to the Commissioner of Buildings before a permit is issued for the alterations, and filed with the Department of Health before a license may be issued for the funeral home.

The frontage consents must be signed by a majority of the property owners according to the frontage on both sides of the street of the block in which it is proposed to locate the funeral home. The signatures must be the signatures of the owners of the fee. Each co-tenant, whether the title is recorded as a joint tenancy or tenancy-in-common, is entitled to sign a frontage consent for only his proportionate interest in the property.

Citation: Code '31: 1690, 3797.

OPINION OF FOREGOING SYNOPSIS

You state that on October 1, 1935, a permit was issued to L— O— for alterations and addition to the building at * * * to be used as a funeral home; that the plans have been approved by the Board of Health previous to being submitted to the Department of Buildings; that on October 11th, the Board of Health requested that the work authorized under the said permit be stopped as frontage consents required by section 3797 had not been filed in their office. You further state that the stop order was issued to the police and you advised the Board of Health that you would release the work upon their request as the ordinance provides that the Board of Health receive and file frontage consents.

* * * * *

On March 20th, a letter was received by Mr. John Nash, Assistant to the Mayor, signed by Dr. Herman N. Bundesen, President of the Board

Health, stating: "that the Board of Health has no objection to recommending a release of the stop order issued by the Building department in the construction of this funeral home."

You ask us: "as this frontage consent has been filed with the Board of Health and approved by them, do the provisions of section 1690 require that the Commissioner of Buildings take any other action respecting such frontage consent?"

Section 1690 of the Revised Chicago Code of 1931, page 542, provides as follows:

"1690. *Frontage consents—general requirements.*) Whenever frontage consents are required for the construction of a building or for any occupation for which a building is about to be constructed or altered, under any section of this ordinance or under any other ordinance of the city, such frontage consents shall be presented to the commissioner of buildings before the issuance of a permit for the erection or alteration of a building for such purpose. Unless otherwise specified, the provisions of this article in such case shall apply as to the definition of the word 'block,' whenever such word is used in any section or ordinance requiring frontage consents."

Section 3797 of the Revised Chicago Code of 1931, page 1371, provides as follows:

"3797. *Frontage consents.*) It shall be unlawful for any person, firm or corporation to locate or establish hereafter any morgue or undertaking business in connection with which the body of any dead person shall be received for embalming or other purposes on or along any boulevard or pleasure driveway, or in any block in any street in which one-third of the buildings on both sides of the street in such block are used exclusively for residential purposes, without the written consent of a majority of the property owners according to the frontage on both sides of the boulevard, pleasure driveway or street in the block in which it is proposed to locate such morgue or undertaking business; but nothing herein contained shall apply to any block in any street in which street cars are operated. Frontage consents, when required under this section, shall be **obtained and filed with the department of health before a license shall issue for such morgue or undertaking business.**"

It is our opinion that frontage consents shall be presented to the Commissioner of Buildings before the issuance of a permit for the erection or alteration of a building for such purpose; that the written consent of a majority of the property owners according to the frontage on both sides of the boulevard, pleasure driveway, or street in the block in which it is proposed to locate such morgue or undertaking business shall be obtained and filed with the Department of Health before a license shall issue for such morgue or undertaking business; that the signatures required must be the signatures of the owners of the fee; that each cotenant, whether the title appears of record as a joint tenancy or a tenancy in common, should be regarded as a qualified petitioner for his proportionate interest in the property only, and that if the petition is signed by persons having no

authority to do so and permits are issued in reliance thereon, such permits can confer no rights upon the parties to whom they are issued.

Said sections 1690 and 3797 above referred to are not inconsistent and the duty devolves upon both the Board of Health and the Department of Buildings to see that the frontage consents are proper.

RIGHT OF SANITARY DISTRICT TO SIGN FRONTAGE CONSENTS

(No. 9040—*Division Marshall in Charge of Fire Prevention—*
L.V.R. and O.F.W.—February 7, 1936—2 pp.)

The Sanitary District has the same right and power to sign a frontage consent petition under the law as has any other abutting owner of property, and frontage owned by it must be included in determining the sufficiency of the petition.

Citation: *Theurer v. People*, 211 Ill 296 (1904).

PARK FRONTAGE

(No. 9323—*Commissioner of Public Works—L.V.R. and G.J.T.*
—October 30, 1936—3 pp.)

The frontage of a park in the center of a boulevard is to be included in considering frontage consents for the location of a filling station.

The Chicago Park District which controls the park has authority to sign frontage consents for parks under its control.

Citations:

Ordinance Code '31: 3274.

Case: *Theurer v. People ex rel. Deneen*, 211 Ill 296 (1904).

POWER OF TRUSTEES UNDER WILL TO GIVE AND REVOKE FRONTAGE CONSENTS

(No. 9242—*Division Marshall in Charge of Fire Prevention—*
N.N.E.—July 21, 1936—4½ pp.)

Unless the will under which they act provides otherwise, a majority of the trustees of an estate must act to give consents for the frontage of property controlled by them, and likewise, a majority of them must act to withdraw a frontage consent.

Citations:

Statutes: ISBS '35, 3: 2.

New Hampshire Laws, 1901, ch. 2, sec. 1.

Cases: Maton Bros. v. Central Illinois Public Service Co., 269 Ill App 99 (1933).

Warner v. Rogers, 255 Ill App 83 (1929).

Ladd v. Ladd, 75 NH 371 (1909).

Sykes v. Parker, 250 Ill App 299 (1928).

Dingham v. Boyle, 285 Ill 144 (1919).

Larimer v. Price, 350 Ill 401 (1933).

Rockwell v. Dowell, 85 NH 58 (1931).

Littell v. Board of Supervisors, 198 Ill 205 (1902).

Other references:

65 CJ 667.

Bogert, Trusts and Trustees, vol. 3, sec. 554.

Op. Corp. Coun. (1924-25). p. 350.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge receipt of your communication dated July 14th, and attached papers pertaining to the frontage consents for filling station permit for premises located at * * *. In your letter you request the views of the Corporation Counsel on the following questions:

1. "Where there are three trustees appointed under the last will and testament of a deceased, is one of the trustees entitled to give the consents of all the trustees to frontage of property controlled?"

2. "Or, if consents are legitimate, has one of the trustees authority to withdraw the consents of all?"

In an approach to the foregoing questions we must analyze the underlying principles governing the powers of co-trustees in the management and control of property involved in a trust.

A recent statute enacted July 1, 1935, dealing with this situation, reads as follows:

"When more than two trustees are required to execute a trust, a majority of the trustees shall be competent to act in all cases, after written notice of the time and place of the meeting at which such con-

templated action is to be taken has been given to each of the trustees at least five days before any action is taken, unless the instrument or authority creating the trust shall otherwise provide." (Illinois State Bar Statutes, 1935, chap. 3, section 2.)

Prior to the enactment of the present statutes our courts have overwhelmingly adhered to the doctrine that in the absence of statutory limitation, or a contrary direction in the trust instrument, the powers of co-trustees are held jointly and their authority is equal and undivided. "The office of co-trustee is joint and all trustees form but one collective trustee and must execute their duties in their joint capacity." (*Maton Bros. v. Cent. Ill. Pub. Service Co.*, 269 Ill App 99. Other cases and authorities in point are: *Warner v. Rogers*, 255 Ill App 83; *Sykes v. Parker*, 250 Ill App 299; *Dingham v. Boyle*, 285 Ill 144; *Corpus Juris*, vol. 65, p. 667; *Bogert, Trusts and Trustees*, vol. 3, sec. 554.)

There have been as yet no cases reported, arising out of the statute in question. We can, however, look to another jurisdiction with a statute somewhat similar to ours for legal guidance. In New Hampshire, the statute recites:

"When more than one trustee is required to execute a trust, a majority of the trustees shall be competent to act in all cases, unless the instrument or authority creating the trust shall otherwise provide." (New Hampshire Laws, 1901, chap. 2, sec. 1.)

The courts of New Hampshire have repeatedly held in view of the foregoing statute that a majority of the trustees must act in order to legally bind a trust. (*Rockwell v. Dowell*, 85 NH 58; *Ladd v. Ladd*, 75 NH 371.)

Oftentimes a legal question may arise as to the nature of the "act" in contemplation of the law. For example, purely ministerial actions such as the signing of a receipt, or the performance of some manual act, may be undertaken by a single trustee; however, such acts requiring judgment, prudence, or the exercise of discretion in the administration of the trust, must be performed by the number of trustees directed in the instrument, or statute, or as we have seen under the common law, by the joint action of all. (*Larimer v. Price*, 350 Ill 401.)

In the case at hand, the giving of frontage consents, or the revocation of same would require the exercise of a considerable amount of discretion on the part of the trustees, and would be the kind of act subject to control by either the statute or the will itself.

* * * * *

It should be borne in mind that we have had no opportunity to examine the provisions of the will by which the trustees of the estate in question derive their authority. It may be that the instrument covers a situation of this kind. If the will so empowers a single trustee to act, then of course, he would be entitled to give the consent in question or to rescind the same; in other words, to find the basis of authority for the present act we must look to the instrument itself.

If on the other hand, there appears to be no express direction in the will, then in the light of the present statute and authorities, a majority of the trustees must act in order to legally bind all the trustees to the frontage consents involved herein; likewise a majority of the trustees would be required to withdraw such consents.

In so far as the act of withdrawing a consent is concerned, assuming that the consent originally obtained is legal, may we call to your attention that we have previously held that the signing of a frontage consent is not "an irrevocable act, and any property owner so signing may withdraw his signature at any time before the petition is finally acted upon by the officer or body to whom it is addressed and before such permit or license is duly issued." (*Opinions of the Corporation Counsel and Assistants*, 1924-1925, p. 350. See also cases cited in said opinion as follows: *Littell v. Board of Supervisors*, 198 Ill 205; *Theurer v. People*, 211 Ill 296; *Kinsley v. Pogue*, 213 Ill 302; *Mack v. Polecat Drainage District*, 216 Ill 56; *Boston v. Kickapoo Drainage District*, 244 Ill 577; *People v. Decatur, Springfield, and St. Louis Railway Company*, 120 Ill App 229.)

FRONTAGE CONSENT WITHDRAWAL

(No. 9591—*Division Marshall in Charge of Fire Prevention—W.V.S.—August 10, 1937—1½ pp.*)

The withdrawal of a frontage consent for a filling station should be with the same formality as the filing of the consent. The withdrawal should be in writing, should identify the site for which it was given, and should contain the sworn statement of the person seeking to withdraw the consent that he is the same person who executed it and that he is still the owner of the property for which it was executed.

CHAPTER IX

RELATIONS OF CITY WITH OTHER GOVERNMENTS

A. CITY REGULATION OF FEDERAL ACTIVITIES

POWER OVER FEDERAL HOUSING PROJECTS

(No. 9194—*Commission of Buildings—J.J.S.—June 8, 1936—*
6¼ pp.)

The City has no power to require the Federal Government to submit its plans and specifications for housing projects in the City to the City's Department of Buildings for approval as the State or its political subdivisions cannot tax, regulate, or control the property of the United States or its instrumentalities.²²

Citations:

- Cases: *People v. United States*, 93 Ill 30 (1879).
 Fagan v. Chicago, 84 Ill 227 (1876).
 Panhandle Oil Co. v. Mississippi, 227 US 216 (1912).
 Johnson v. Maryland, 254 US 51 (1920).
 Grayburg Oil Co. v. Texas, 278 Ill 582 (1917).
 McCulloch v. Maryland, 17 US 316 (1819).
 Ohio v. Thomas, 173 US 276 (1898).
 Challam County v. United States and United States Spruce Production
 Corporation, 263 US 341 (1923).
 Hammer v. Dagenhart, 247 US 251 (1917).
 Indian Motorcycle Co. v. United States, 283 US 570 (1930).
 Arizona v. California, 283 US 423 (1930).
Other reference: Op. No. 9099 (this volume, p. 300).

²² The United States Circuit Court of Appeals of the Tenth Circuit has held [94 F(2d) 323 (1938)] that the act of Congress (40 USCA ¶421) providing that acquisition of property by the United States in connection with low-cost housing projects shall not deprive any State of its civil and criminal jurisdiction over such property, did not vest in any city the right to enforce ordinances requiring permits and providing for the inspection of low-cost housing projects under contract between the United States and a contractor. The intent of Congress and the purpose of the act was to authorize the service of civil and criminal processes of the State upon the premises of such housing projects and to enable persons residing thereon to exercise the rights of citizens of the State.

OPINION OF FOREGOING SYNOPSIS

In your letter to the Corporation Counsel relative to housing projects by the Federal government, you submit the question as to whether or not the Government's plans and specifications for buildings in housing projects in Chicago are subject to the provisions of the Revised Chicago Code of 1931 as enforced by your department.

In a letter dated March 13, 1936, to C. H. Keller, Superintendent of the Bureau of License, we stated that it was our opinion that the City had no authority to require a license fee from the Government or the Works Progress Administration when buildings were rented by the WPA in Chicago for Federal theatrical projects. The reason for this opinion was that neither the State nor any of its political subdivisions had the right to impose a tax or a license fee on the Government property or any of its instrumentalities.

In support of our opinion we cited the following cases:

People ex rel v. United States of America, 93 Ill 30,
Fagan v. City of Chicago, 84 Ill 227,
Panhandle Oil Co. v. State of Mississippi, 227 US 216,
Johnson v. State of Maryland, 254 US 51,
Grayburg Oil Co. v. Texas, 278 Ill 582,
McCulloch v. Maryland, 4 Wheat (U.S.) 316,
Ohio v. Thomas, 173 US 276.

The foregoing cases hold that the State has no power to tax land belonging to the United States even though it is not used for governmental purposes (*People ex rel. v. United States of America, supra*); to confirm a special assessment for local improvements against property of the government even though the property is increased in value by the improvement (*Fagan v. City of Chicago, supra*); to require a dealer to pay to the State a tax on gasoline which he sells to the government (*Panhandle Oil Co. v. State of Mississippi, supra*); to require an operator of a Government motor truck to take out a license based on an examination as to competency and the payment of a fee (*Johnson v. State of Maryland, supra*); to prosecute and fine a governor of a soldiers' home who disregarded the State law in furnishing oleomargarine to its inmates (*Ohio v. Thomas, supra*); to tax land held by a corporation organized and owned by the government under congressional authority to help carry on the war (*Challam County v. United States and United States Spruce Production Corporation*, 263 U. S. 341).

The problem which you present is not one of raising revenue but of regulation. The first comes under the taxation power of the State, the second under its police power which is used only for the purpose of promoting the general welfare of the State. Laws relative to zoning which regulate the construction of buildings are passed by a municipality in the exercise of its police power. These are purely local matters. In these matters, under the decisions the State is supreme.

In discussing the supremacy of the State in purely local matters, the Supreme Court of the United States, in *Hammer v. Dagenhart*, 247 U. S.

251, a case holding unconstitutional a Federal child labor law as invading the powers reserved in the State, said at page 275:

"* * * The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institution as is the conservation of the supremacy of the federal power to all matters entrusted to the Nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government, and to them and to the people the powers not expressly delegated are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government."

The above, of course, was a case where Congress sought to regulate a matter which came under the police power of the State, not a matter where the State sought to regulate an instrumentality of the government.

The same ruling was made in the case of *Indian Motorcycle Co. v. United States*, 283 US 570, where the government sought to tax motorcycles sold to a municipality to be used in police work. The holding was that instrumentalities, means, and operations by which the States exercised governmental powers belonging to them were exempt from Federal interference.

The converse is likewise true; namely, that the State or any of its political subdivisions has not the power to tax, regulate or control the property of the United States or its instrumentalities. An instrumentality is usually regarded as a means or agency to accomplish the thing sought to be accomplished. The Supreme Court of the United States has been jealous of the power of the Federal government to keep its property and instrumentalities free from State control.

In the case of *Johnson v. State of Maryland*, *supra*, it held that a State law requiring drivers of motor trucks on State highways to take an examination based on competency and the payment of a fee did not apply to an employee of the Post Office department engaged in driving a Government motor truck over a post road in the performance of his official duty. The court said at page 57:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on."

In our opinion the case of *Arizona v. California*, 283 US 423, is conclusive of the point that there is no obligation on the Federal government to submit to the control of the states or any other political subdivisions the things which the Government has the right to do. It is particularly applicable to the facts presented by you. In the aforesaid case an original petition was filed in the Supreme Court of the United States

against the Secretary of the Interior, the states of California, Nevada, Utah, New Mexico, Colorado, and Wyoming to enjoin the carrying out of the Boulder Dam project authorized by an act of Congress. The bill was demurred to, and on hearing dismissed. One of the important points urged was that the state of Arizona had provided in its laws that no dam was to be built in that state without the plans being approved by the State engineer; that the dam was being built in Arizona by the Federal government and that no plans had been submitted to or approval sought from the State. The court held that if Congress had the power to authorize the construction of the dam, the United States was under no obligation to submit the plans and specifications to the State engineer for approval.

We quote at length from this opinion written by Mr. Justice Brandeis. At pages 449 and 451 the court said:

"The wrongs against which redress is sought are, first, the threatened invasion of the quasi-sovereignty of Arizona by Wilbur in building the dam and reservoir without first securing the approval of the state engineer as prescribed by its laws; and, second, the threatened invasion of Arizona's quasi-sovereign right to prohibit or to permit appropriation, under its own laws, of the unappropriated water of the Colorado river flowing within the state. The latter invasion, it is alleged, will consist in the exercise, under the act and the compact, of a claimed superior right to store, divert, and use such water.

"First. The claim that quasi-sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the state. At Black Canyon, the site of the dam, the middle channel of the river is the boundary between Nevada and Arizona. The latter's statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the state engineer; and the statutes declare in terms that this provision applies to dams to be erected by the United States. Arizona Laws 1929, chap. 102, Secs. 1-4. See also Revised Code of 1928, Secs. 3280-3286. The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

"The United States may perform its functions without conforming to the police regulations of a state. *Johnson v. Maryland*, 254 U. S. 51, 65 L. Ed. 126, 41 S. Ct. 16; *Hunt v. United States*, 278 U. S. 96, 73 L. Ed. 200, 49 S. Ct. 200. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and specifications to the state engineer for approval."

The question which we really have before us concerns the power of Congress. Has it the power to authorize the housing projects? If it has, we have no control. If it has not, there is no necessity for control because the projects cannot be built. The Supreme Court of the United States has not passed upon the constitutionality of the law authorizing the projects. Until it has done so, we must assume that power to authorize it in Congress.

It follows that the city of Chicago has no power to require the Federal government to submit its plans for housing projects to the City's Building department for approval.

ELECTRICAL INSPECTION OF FEDERAL HOUSING PROJECTS

(No. 9090—*Acting Commissioner of Streets and Electricity—J.J.S.—March 13, 1936—2½ pp.*)

The City has no authority to inspect electrical wires and devices in buildings under construction by the Federal government as low-cost housing or slum clearance projects. By a State act the Federal government has been given exclusive jurisdiction over land acquired by it for any of its purposes, the only right retained by the State being the right to serve on that land any civil or criminal process.

Citations:

Statute: ISBS '35, 143: 17-19.

Other reference: Op. Corp. Coun. (1897-1905), p. 612.

Opinion No. 9444 (4½ pp.) of March 4, 1937, to the President of the Board of Health discusses the same subject as the above opinion.

FEDERAL THEATER PROJECT LICENSE

(No. 9099—*Superintendent, Bureau of License—J.J.S.—March 13, 1936—10½ pp.*)

If the Works Progress Administration in Illinois, pursuant to authority given by Congress, rents a theater to relieve unemployment, that theater becomes one of the instrumentalities of the Federal government and as such is not subject to a license tax to operate. The renting of the theater, however, by the Federal government does not relieve the owners of the building

of their obligation toward the State and the City to pay taxes and to observe fire and other regulations.

Citations:

- Statute:** Federal Emergency Relief Appropriation act, USCA, Title 15, ch. 16, p. 140.
- Ordinance:** Code '31: 1893, 1894.
- Cases:** *Metropolis Theater Co. v. Chicago*, 246 Ill 20 (1910).
People v. United States, 93 Ill 30 (1879).
Fagan v. Chicago, 84 Ill 227 (1876).
Panhandle Oil Co. v. State of Mississippi, 227 US 218 (1927).
Johnson v. State of Maryland, 254 US 51 (1920).
Grayburg Oil Co. v. Texas, 278 US 582 (1928).
McCulloch v. State of Maryland, 17 US 316 (1819).
Ohio v. Thomas, 173 US 276 (1898).
Fox Film Co. v. Doyal, 286 US 123 (1932).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of March 10, 1936, to which you attach a communication from E. Kendell Davis, Assistant Federal Director, Federal Theatre Project, calling attention to the fact, that as part of the Works Progress Administration, projects for the employment, primarily of professional actors on relief, are being put into operation; that in furtherance of these projects the Great Northern theater has been rented for the production of plays beginning March 11, 1936; that all expenses in connection with this project including wages, costumes, scenery, etc., will be paid from Federal funds and that any receipts collected will be used to pay rent and purchase additional scenery and costumes. The Works Progress Administration requests that the Government be exempted from paying the usual theatre license fee, inasmuch as this project is operated by the Government for the benefit of citizens of the city of Chicago. You desire to be advised as to whether or not an amusement class-one license, which is the usual license for a theatre of this class, is necessary for the operation of the Great Northern theater under the Works Progress Administration.

The Government does not refuse to pay the fee but requests to be relieved from payment. Your inquiry, however, as to whether a license is necessary raises the question of the City's right to require a license, the right of the State or any of its political subdivisions to license, assess, or tax the property of the Government, or any of its instrumentalities.

Section 1893 of the Revised Chicago Code of 1931 divides theatricals, shows, and amusements offered or exhibited for gain into twenty-two classifications. Section 1894 of the same Code provides for a license tax. It reads in part as follows:

"No person, firm or corporation, either as owner, lessee, manager, officer or agent shall give, conduct, produce, present or offer for gain

or profit any of the entertainments as specified in the proceeding section without having first obtained a license therefor."

It is clear by the terms of the aforesaid section that a license must first be procured before theatrical exhibitions can take place; however, under the authorities hereinafter cited it is likewise clear that neither the State nor any of its political subdivisions can impose a tax on the Government or any of its instrumentalities.

The Supreme Court of the state of Illinois in the case of *Metropolis Theater Co. v. Chicago*, 246 Ill 20, in passing on the question of a license tax or fee said at page 23:

"A license is a privilege granted by the State directly or indirectly through the medium of a municipality, usually upon the payment of a valuable consideration, called a license fee. The license must confer authority to do something which would be illegal if done without such license. (Cooley on Taxation, 1137) License fees may be imposed for regulation, revenue or prohibition (*Bessette v. People*, 193 Ill. 334.) The license fee may be both for regulation and revenue."

The City in the above cause admitted that the fee was far in excess of the cost of regulation, so that the greater part of the fee was for revenues. The same is true as to charges made for licenses today. We charge fees to pay the cost of regulation and to raise revenue for the City. That part of the fee in excess of the amount necessary to regulate is raised to enable the City to perform its governmental functions. The court in sustaining the principle that the City had the right to raise revenue through license fees based this power on the statutes. At page 24, the court said:

"It is apparent from the language above quoted that the legislature intended to confer full power on cities and villages to license, tax, regulate, suppress, prohibit the several enumerated occupations, (theaters) subject to no other limitations than are imposed by the constitution upon the legislature itself * * *. The ordinance may be sustainable under the taxing power alone, without reference to its reasonableness as a regulation measure."

Taxes generally are defined as enforced proportional contributions of persons and property, levied by authority of the State for the support of the Government to enable it to discharge its functions. While there is nothing in the Constitution of the United States inhibiting the states from levying a tax on Government property or instrumentalities or licensing the same, yet the Supreme Courts of the several States and of the United States have held that taxes or license fees cannot be imposed upon the property or instrumentalities of the Government. There is no difference in principle as to how money is raised when it is used to support the Government; it is regarded as a tax whether it comes through the collection of license fees or from a levy on property generally.

In the case of *People ex rel. v. United States of America*, 93 Ill 30, it appears that an application was made by the County Collector to the County Court of Cook County for a judgment for taxes on property delinquent for

the nonpayment of taxes which property was owned by the United States of America. The property was not used for governmental purposes. The court in sustaining the proposition that the taxes were not collectible said at page 36:

"It is said the taxing power of the State is one of its attributes of sovereignty, and where there is no restraining compact with the Federal government, nor no cession of inconsistent jurisdiction in the United States, it extends to all property in the State and may be exercised upon every object brought within its jurisdiction. But broad and comprehensive as this power of taxation existing in the State is conceded to be, it has not been considered so extensive as to embrace property regarded as the instruments or means of conducting the Federal government, in pursuance of the constitution, nor to subjects over which the sovereign power of the State does not extend. Such property has always been conceded to be exempt from taxation by State governments. The cases sustaining these general propositions of law are of conclusive authority with us. *Fagan v. City of Chicago*, 84 Ill 233; *Transportation Company v. City of Wheeling*, 9 Otto 273; *McCulloch v. State of Maryland*, 4 Wheat. 429; *Nathan v. Louisiana*, 8 How. 82. No argument is made against these propositions, now so generally conceded as to be regarded as almost self-evident. But the position taken is, that the power of the State to tax extends to all objects and property within its jurisdiction except when the exercise of such power is prohibited by the Federal constitution, and also except the means and instruments employed by the Federal government in the execution of the powers conferred in pursuance of the constitution; and as there is no inhibition in the Federal constitution against taxing such property as that involved, and as it is not an instrumentality employed by the government, it is said it is subject to the taxing power of the State notwithstanding the title may be in the United States."

In answer to this foresaid contention, the court said at page 37:

"Ample as the State power of taxation undoubtedly is it does not, as we have seen, reach the means and instruments of the Federal government, nor to the administration of justice in the Federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of Congress. The reason is obvious, and it is that the power to tax involves the power to destroy. An unlimited power of taxation existing in the Federal or State governments would result in consequence of interfering powers, as expressed by Chief Justice Marshall, in *McCulloch v. State of Maryland*, in the right of one government to pull down what there is an acknowledged right in another to build up, or in the right of one government to destroy what there is the right in another to preserve."

The question of imposing an obligation on the Government without its consent was submitted to our Supreme Court in the case of *Fagan v. City of Chicago*, 84 Ill 227. This submission grew out of the confirmation of a special assessment against Government property. A special assessment has been defined as a charge in the nature of a tax, imposed for the purpose of paying a local improvement in a municipal corporation and levied only on those parcels of real property which are specially benefited.

The court in sustaining the proposition that the City was without power to confirm the assessment, said at page 233:

"It is also urged, that block 121, School section addition, owned by the United States government, should have been assessed. We apprehend that no rule is more uniformly recognized than that property of government is never taxed, unless expressly required by statute. It would only be to pay money from the treasury to be returned thereto. It could be of no kind of benefit. It would be entirely useless, and hence the government never requires such an act to be performed. Nor under our system of government can the States tax the general government, its agents or property, nor can the general government tax the States, agents or property, See *McCulloch v. Maryland*, 4 Wheat. 316, *Osborn v. The Bank of the United States*, 9 id. 738. In these cases it was held that the States have no power to tax the instrumentalities of the general government employed in the performance of its proper functions."

At page 234, the court again said:

"* * * We are aware that such is the theory of these assessments, and that they differ materially from taxes; but it does not, therefore, follow, that public property may be assessed. A municipal corporation has no power to assess or exact from the State or the general government any sum for benefits conferred. The power to levy taxes or impose assessments for benefits can only be exercised on the governed, and not on the governing power, whether State or Federal."

The state of Mississippi sued to recover taxes claimed on account of sales of gasoline made for the use of the Federal Coast Guard Fleet in service in the Gulf of Mexico and its Veterans Hospital at Gulfport in that State. The Supreme Court of Mississippi (147 Miss 663, 112 So 584) held the exaction a valid privilege tax measured by the number of gallons of gasoline sold; that it was not a tax upon instrumentalities of the Federal government and that the United States was not entitled to buy such gasoline without the taxes charged other uses of gasoline being paid.

In reversing the Supreme Court of Mississippi, in this case entitled *Panhandle Oil Co. v. State of Mississippi*, 277 US 218, 56 ALR 583, the Supreme Court of the United States said at page 221:

"The United States is empowered by the Constitution to maintain and operate the fleet and hospital. Article 1, sec 8. That authorization and laws enacted thereto are supreme (Art. VI), and in case of conflict, they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions * * *."

"While Mississippi may impose charges upon the petitioner (the dealer who sold the gasoline) for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."

In the case of *Johnson v. State of Maryland*, 254 US 51, the court held that a law of the State penalizing operators of motor trucks on highways who have failed to obtain a license based on examination of competency and the payment of a fee cannot constitutionally apply to an employee of the Post Office department while engaged in driving a government motor truck over a post road in the performance of his official duty.

The court said at page 56:

"With regard to taxation, no matter how reasonable, or how universal and discriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States (4 Wheat. 429, 430) and that is the law today."

At page 57 the court further said:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on."

The same holding was had in the case of *Grayburg Oil Company v. Texas*, 278 US 582, in reversing the Supreme Court of Texas (3 SW (2d) 427) for holding that the State had the right to collect a tax on gasoline sold to the United States and delivered on a military reservation in the State.

The principle upon which the Supreme Court of the United States and the Supreme Courts of the States have acted in holding the means and instrumentalities of the Government immune from a tax by the State or any of its political subdivision, whether the tax be in the nature of a general tax, a special assessment tax, or a license tax was first laid down in the case of *McCulloch v. Maryland*, 4 Wheat. (US) 316. Chief Justice Marshall, speaking for the court, said:

"If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states."

In 1933 and prior thereto, a great economic crisis faced the United States resulting in the failure of many businesses and the unemployment of millions of citizens. To meet this crisis Congress passed the Federal Relief act on March 12, 1933. Under the provisions of this act the President of the United States appointed Harry L. Hopkins as Federal Emergency Relief Administrator. He is still in office and in charge of Works Progress Administration projects. On April 8, the Emergency Relief Appropriation act of 1935 was passed (USCA, title 15, chapter 16, page 140) providing for an expenditure of \$4,000,000,000.00 under the direction of the President

in order to provide relief, work, and to increase employment by providing for useful projects. The appropriation made available \$300,000,000.00 for "assistance for educational, professional, and clerical persons" and authorized the payment of rental at the seat of Government or elsewhere, and such other expenses as the President should deem necessary for the accomplishment of relief. Under the powers conferred in the various acts of Congress the Works Progress Administration has rented the Great Northern theater, the object being to put on theatricals and employ actors out of employment as it is authorized to do by Congress, the ultimate purpose of which is to help end unemployment. The renting and use of this theater is but one of the many instrumentalities to relieve unemployment employed by the Government to carry its powers into execution.

In *McCulloch v. State of Maryland*, *supra*, Chief Justice Marshall said at page 437:

"* * * But this tax is on the operation of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

Any direct burden placed by the State or its political subdivisions on any instrumentality of the Government cannot be sustained. (*Fox Film Co. v. Doyal*, 286 US 123.)

In *Ohio v. Thomas*, 173 US 276, at page 283, the court held immune from prosecution the governor of a soldiers' home who disregarded the State law in furnishing oleomargarine to the inmates of the institution as part of the rations, on the ground that the Federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are approved by Federal authority."

From the analysis of the foregoing authorities it is evident that the taxing power of the State may not be exerted over Federal operations and instrumentalities because of the supremacy of the Federal government in the field of constitutional authority; that the power of taxation is coextensive with sovereignty; that the right to license and regulate is under the police power of the State, and as the police powers cannot be more extensive than sovereignty, the police and taxing powers must be coequal. From this it necessarily follows that the absence of power to levy a tax on the means and instrumentalities of government, whether these means and instrumentalities be property of the Government, its employees or agencies, equally forbids the exercise of the police power of the State to regulate or control, by the issuance of a license, the official operations of Government employees or agencies.

An instrumentality is usually regarded as a means or an agency to accomplish the thing sought to be accomplished. Any activity created by the Government under the broad grant of powers to relieve unemployment may be regarded as a governmental agency or instrumentality. With the Supreme Court of the United States regarding a license fee or tax, a special assessment tax, a gas tax, and a general property tax all in the same category, as each one imposes a burden on the instrumentalities of government, it is our opinion that if the Works Progress Administration in Illinois in pursuance to the authority given by Congress rents a theater

to relieve unemployment that the said theater becomes one of the instrumentalities of the Federal government, and as such is not subject to a license tax to operate. The renting by the Government does not however relieve the owner of the building of their obligations toward the State and the City as to payment of taxes, fire regulations on building, etc.

LICENSE FOR FEDERAL MOTOR VEHICLE

(No. 9598—City Clerk—M.H.F.—August 19, 1937—2½ pp.)

A motor vehicle which is owned by the United States is not subject to the City's motor vehicle license ordinance but in the absence of express authority, the City Clerk may not issue City vehicle license emblems free of charge. A vehicle owned by the Federal government should be plainly marked with the name of the governmental agency using it in letters at least one and one-half inches in length in a conspicuous place on the outside of each side of the vehicle in order adequately to identify it as Federal government property and to obviate police interference.

Citations:

Ordinances: Code '31: 2063, 2073.

Other references: 18 Op. Corp. Coun. 7 (No. 7802), 478 (No. 7184), 479 (No. 7412, No. 7567).

APPLICATION OF MOTOR VEHICLE INSPECTION ORDINANCE TO MAIL TRUCKS

(No. 9351—Public Vehicle License Commissioner—A.F.G.—December 4, 1936—2 pp.)

Neither the City nor the State has the power to license, inspect, or examine automobiles or chauffeurs of the United States used or employed in the conveyance of the mails, as they are the instrumentalities which the Federal government employs in carrying on duties imposed by Federal law and are not subject to the direction or control of the State or City.

Citations:

Ordinance: Code '31: 2061B.

Case: Johnson v. Maryland, 254 US 51 (1920).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of November 19, 1936, inquiring whether or not section 2061-B, article V, chapter 39, of the Revised Chicago Code of 1931, concerning the mandatory inspection of motor vehicles owned or operated by residents of the city of Chicago applies to motor vehicles of the United States government being operated in this City in the United States mail service, which vehicles do not carry either City or State vehicle licenses.

Section 2061-B of the Chicago Code of 1931 as amended reads as follows:

"2061-B. From and after July 1, 1936, it shall be unlawful for a resident of the City of Chicago, including corporations having their principal offices or places of business in said city, owning a motor vehicle for the transportation of persons or property, to operate the same over the public streets of the City of Chicago without having such vehicle inspected as hereinafter provided at one of the municipal testing stations in said city."

The government of the United States is not a resident of the city of Chicago, nor is it a corporation having its principal office or place of business in the said City and is therefore not amenable to the provisions of the inspection ordinance.

Regardless of the residential limitations of the ordinance, neither the City or the State has power to license, inspect, or examine automobiles or chauffeurs used and employed by the United States government in the conveyance of the mails, as they are the instrumentalities which the Government employs in carrying on the duties imposed by Federal law and are not subject to the direction or control of the State or municipality. (*Johnson v. Maryland*, 254 US 51.)

* * * * *

**EXEMPTION OF UNITED STATES MARINE HOSPITAL
RESIDENT EMPLOYEES FROM WHEEL TAX**

(No. 9011—City Clerk—M.D.S.—January 10, 1936—1½ pp.)

Federal employees who live and garage their cars at the United States Marine hospital come within the same classification as army officers stationed on military reservations in that they do not "reside within the City of Chicago," and therefore are not subject to the payment of wheel tax licenses. However, the City Clerk is not authorized to issue free wheel tax plates or stickers to such Federal employees as the ordinance provides

for the issuance of plates or stickers only to vehicles owned or operated by the Federal government.

Citations: Op. Corp. Coun. (1920-23), p. 493.
18 Op. Corp. Coun. 479 (No. 7567).

VEHICLE LICENSE EMBLEM FOR FEDERAL RESERVE BANK

(No. 9010—City Clerk—M.H.F.—January 10, 1936—3 pp.)

Whether or not the Federal Reserve bank of Chicago is an official agency of the Federal government, the personal property of which may not be taxed by the City, the City Clerk may not issue gratuitously a City vehicle license emblem to the bank because there is no authority in the Revised Chicago Code of 1931 for such an issuance, and because the fee exacted for a motor vehicle license is not a tax upon the properties of the bank as the term "tax" is used in the Federal statute, but merely a license fee exacted in return for the privilege of using a motor vehicle on the City's streets.

Citations:

Ordinances: Code '31: 2071, 2071-A, 2073.

Statute: United States Code Annotated, title 12, ch. 4, sec. 531.

Cases: Smith v. Kansas City Title and Trust Co., 255 US 180 (1920).
Des Moines National Bank v. Fairweather, 263 US 103 (1923).
Hibernia Savings Society v. San Francisco, 200 US 310 (1905).
United States Distilling Co. v. Chicago, 112 Ill 19 (1884).

OPINION OF FOREGOING SYNOPSIS

You transmit with your communication of January 8, 1936, a letter received by you from Mark A. Lies, Supervisor of Building, Federal Reserve Bank of Chicago, which states that under the Federal Reserve act, Federal Reserve banks are exempt from taxes except taxes on real estate, and requests that you issue without charge a 1936 vehicle license emblem

for the bank's armored car. Descriptive data regarding the car is furnished. Our opinion is requested as to whether you are authorized to issue a license emblem without the payment of the proper fee.

Section 2073, as amended, of the Revised Chicago Code of 1931, exempts from the vehicle tax all vehicles owned or operated by the United States government and provides that every vehicle owned by the United States government, which is not plainly marked to indicate that it is the property of the United States government shall at all times while being operated upon the streets, avenues, or alleys of the city of Chicago have a metal plate or transparent sticker license affixed thereto of the kind and type provided in section 2071 and 2071-A, to be furnished by the City Clerk free of charge.

We do not however understand from Mr. Lies' letter that the armored car is the property of the United States government, but only that it is the personal property of the bank.

Section 531, chapter 4, title 12 of the Code of the Laws of the United States of America provides as follows:

"Federal Reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate."

It seems clear, and the Supreme Court of the United States has repeatedly so held, that States and their municipalities are without power to levy any taxes directly or indirectly upon national banks or their property or franchises, except so far as the permissive legislation of Congress allows such taxation. (*Smith v. Kansas City Title and Trust Co.*, 255 US 180, 41 Sup Ct Rep 243; *Des Moines National Bank v. Fairweather*, 263 US 103, 44 Sup Ct Rep 23; *Hibernia Savings Society v. San Francisco*, 200 US 310, 26 Sup Ct Rep 265.)

Conceding for the purpose of this opinion that the Federal Reserve bank of Chicago is an official agency of the Federal government, the personal property of which may not be taxed by the municipality, in our opinion you would not be authorized to make a gratuitous issue of a City vehicle license emblem to the bank for the reason that there is no authority in the Code authorizing you to make such gratuitous issue and for the further reason that the fee exacted for a motor vehicle license, though denominated a tax, is not in reality a tax upon the property of the bank as the term "tax" is used in the Federal statute, but merely a license fee exacted in return for the privilege of using a motor vehicle on the City's streets. A license, in its proper sense, is a term distinct from taxation. (*Distilling Co. v. City of Chicago*, 112 Ill 19) Exemption from taxation would not exclude exemption from license.

B. FEDERAL TAXATION OF CITY EMPLOYEES

PAYMENT OF FEDERAL INCOME TAX BY BUREAU OF WATER EMPLOYEES

(No. 9476—*Commissioner of Public Works—M.H.F.—April 2, 1937—2½ pp.*)

Employees of the City Bureau of Water are not required to pay a Federal income tax for the year 1937 on their salaries received from the City.

Employees of the City Bureau of Water can recover income tax payments made in previous years if they file their claims within three years from the time they filed their returns, or within two years from the time they paid their taxes.

Citations:

Statute: Federal Revenue act of 1936, sec. 322.

Case: *Brush v. Commissioner of Internal Revenue*, 299 US 536 (1937).

Other reference: Bureau of Internal Revenue Regulations, reg. 94, art. 322-3, 322-7.

OPINION OF FOREGOING SYNOPSIS

Referring to the recent decision of the Supreme Court of the United States in the case of *Brush v. Commissioner of Internal Revenue* you request answers to the following questions:

1. Will employees of the Bureau of Water of the city of Chicago have to pay an income tax for 1937?
2. Can they recover income tax payments made in the previous years?

Upon the assumption that the Bureau of Water of the city of Chicago is similarly situated to the Bureau of Water Supply of the city of New York and that the decision in the *Brush* case is applicable to and controlling upon your questions (we see no reason why it is not), our opinion is that employees of the Bureau of Water of the city of Chicago are not required to pay a Federal income tax for the year 1937 on their salaries received from the city of Chicago.

Regarding your second question as to whether employees of the Bureau of Water of the city of Chicago can recover income tax payments made in previous years, our opinion is that they may recover such payments made within the statutory period of limitation, which we understand to be within three years from the time returns were filed by the taxpayers

or within two years from the time the taxes were paid. (Section 322, Revenue act of 1936; articles 322-3 and 322-7, regulation 94, Bureau of Internal Revenue.) The regulations of the Bureau prescribe that claims by taxpayers for the refunding of taxes erroneously or illegally collected shall be made on a prescribed form (No. 843) and filed with the Collector of Internal Revenue and that a separate claim shall be made by each taxpayer for each taxable year or period.

Since the receipt of your communication we have endeavored to ascertain the attitude of the local Collector of Internal Revenue regarding your questions. While his office knows of the decision in the *Brush* case it has received no official instruction from the Commissioner of Internal Revenue regarding it which countermands previous specific instructions to collect taxes from Water bureau employees, though we are told the Collector has written the Commissioner regarding the decision and its application to employees of Chicago's Bureau of Water. * * *

APPLICABILITY OF SOCIAL SECURITY ACT TO EMPLOYEES OF RETIREMENT BOARD

(No. 9375—*Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G.F.M.—December 15, 1936—1 p.*)

The Municipal Court and Law Department Employees' Annuity and Benefit Fund, since it is an instrumentality of the State, is outside of the Federal Social Security act and so no return need be made for the employees of its Retirement Board under that act.

Citation: Social Security act, title 2, sec. 210.

EMPLOYEES EXEMPTED FROM FEDERAL SOCIAL SECURITY ACT

(No. 9447—*Retirement Board, Firemen's Annuity and Benefit Fund—G.F.M.—March 8, 1937—1 p.*)

As the Firemen's Annuity and Benefit fund is an instrumentality of the state of Illinois, the employees of the Retirement Board of that fund are not included within the provisions of the Federal Social Security act.

Citation: Federal Social Security act, title VIII, sec. 811, par. b.

C. WORKS PROGRESS ADMINISTRATION PROJECTS

POWER OF CHICAGO RECREATION COMMISSION TO SPONSOR WPA PROJECTS

(No. 9502—*Chairman, Chicago Recreation Commission—A.F.G.*
—April 23, 1937—3 pp.)

As one of the chief functions of the Chicago Recreation Commission is "to act in an advisory capacity to the City Council, the Mayor, and the various administrative officials concerned in the coordination and the development of recreational facilities," there appears to be no legal objection to its acting in the capacity of "Accommodating Sponsor" for WPA recreation projects, for there is no cost entailed and no direct responsibility for the operation of the projects.

Citations:

Coun. J. (1932-33), p. 3169.

Coun. J. (1933-34), p. 1836.

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of April 9, 1937, asking our opinion as to the competence of the Chicago Recreation Commission to act as what is termed "Accommodating Sponsor" for certain city-wide Works Progress Administration recreation projects.

You state:

"All of the 3500 WPA workers and funds for their payment are under the Works Progress Administration and not under the Chicago Recreation Commission.

"The Works Progress Administration, however, required some recognized municipal agency to serve in the capacity of an 'Accommodating Sponsor' in behalf of all of the recreation projects operating in Chicago because the Works Progress Administration at Washington had issued instructions that the present several operating projects as shown on this chart could not continue to operate independently but must come under one city-wide project.

"There is no other city-wide municipal recreation agency in Chicago but the Chicago Recreation Commission. If this agency is not used, then

the projects would be referred through the State office in one project under the Department of Public Welfare at Springfield.

"This would entail the loss of local autonomy and remote relationships that would retard the work in Chicago and it is the opinion of the local WPA Administration city officials that for a city of the size of Chicago, as large in population as a group of States, it is wiser to have the sponsorship handled locally."

You state also:

"The 'Accommodating' sponsorship was signed by the Commission several months ago and has been in successful operation in a manner satisfactory to the individual projects, but that one proposed new project has inquired as to the power of the Commission to act in this capacity and in a friendly manner has asked for an opinion regarding this."

The Chicago Area Recreation Commission was created by resolution of the City Council of Chicago, December 16, 1932, Council Journal, December 16, 1932, pages 3169-70.

The functions of the Commission as provided by said resolution shall be:

"1. To make a survey of public, privately supported and commercial recreational facilities.

"2. To make recommendations on a comprehensive recreation plan for Chicago and the Chicago area.

"3. To act in an advisory capacity to the City Council, the Mayor, and the various administrative officials, concerned in the co-ordination and the development of recreational facilities, use of leisure time, and a comprehensive program for the entire community."

The membership of the Commission was named by the Mayor, *Council Journal*, March 21, 1934, page 1836. Additional members have been added to the Commission at various intervals since that time.

Appropriations to carry on the work of the Commission are annually made by the City Council.

As one of the chief functions of the Commission is "to act in an advisory capacity to the City Council, the Mayor, and the various administrative officials, concerned in the co-ordination and the development of recreational facilities," we can find no legal objection to its acting in the capacity of "Accommodating Sponsor" for these WPA projects. There is no cost entailed in this sponsorship and no direct responsibility for the operation of the projects.

If the WPA, which is paying the cost of these projects, is willing to accept the Commission as sponsor, we can see no reason why others should complain.

BOARD OF HEALTH RECORDS OF WPA WORKERS

(No. 9153—*President, Board of Health—May 7, 1936—M.H.F.*
—3½ pp.)

The President of the Board of Health should not furnish medical history records of WPA workers to the WPA compensation department, except on the order of a court or the consent of the workers, unless the Attorney General holds that he may do so, as the Board of Health is a State agency under the State Board of Health act and is governed by the rules and regulations of the State Board of Health which require that such medical records be confidential.

Citations:

Statute: ISBS '35, 65a: 2, 7.

Other reference: Department of Public Health, Division of Communicable Diseases,
Manual and Outline of Procedure for Health Officers for the
Control of Communicable Diseases, Rules 2, 3, 5, 6, 7.

**WPA FORM WHICH DOES NOT LIMIT CITY'S LIABILITY
FOR COST OF SPONSORED PROJECT**

(No. 9600—*Commissioner of Public Works—J.F.G.—August 20,*
1937—6½ pp.)

The City may not execute an agreement with the Works Progress Administration on a form which does not state the maximum liability of the City. The form in question, taken together with the City's proposal as sponsor and the approval of that proposal by the Works Progress Administration, does not obligate the Federal government to pay a definite part of the cost of the project, but obligates the City as sponsor to finance such a part of the entire cost of the project as is not paid from Federal funds.

The City may make no expenditure which has not been provided for in the annual appropriation bill unless the expenditure is necessitated by a casualty or accident which occurred after the passage of the annual appropriation bill.

Citations:

Statute: Public Resolution No. 47 (75th Congress).

Cases: Chicago v. Nichols, 177 Ill 97 (1898).

Litz v. Village of West Hammond, 230 Ill 310 (1907).

Siegel v. City of Belleville, 349 Ill 240 (1932).

Other references: WPA form P-78.

WPA Official Bulletin, No. 234.

OPINION OF FOREGOING SYNOPSIS

By your letter of August 17, 1937, you transmitted General Letter No. 148 dated July 22, 1937, of the Works Progress Administration on the subject of the agreement of sponsors for financing non-Federal projects, also form of agreement P-78 for execution by the sponsoring agency prepared by the Works Progress Administration, Official Bulletin No. 234 dated July 30, 1937, relating to the subject and a copy of Public Resolution No. 47 passed by the 75th Congress making appropriations for relief purposes.

In the public resolution referred to, it is provided:

"And no non-Federal project shall be undertaken or prosecuted under this appropriation unless and until the sponsor has made a written agreement to finance such part of the entire cost thereof as is not to be supplied from Federal funds."

Pursuant to this provision of the act, the form of agreement prepared by the Works Progress Administration reads as follows:

"In consideration of expenditures to be made from Federal funds on the project proposal described hereon, we, the sponsors, do hereby agree that we will finance such part of the entire cost thereof as is not to be supplied from Federal funds."

It is requested that the City's representative execute the foregoing form of agreement not only as to project applications made in the future, but also as to project applications heretofore approved covering project operations initiated subsequent to June 30, 1937.

You ask for our consideration of the subject and seek immediate advice as to the proper course to pursue in response to the request of the District Director of the Works Progress Administration to cause the form of agreement P-78 to be executed by the proper officers of the city of Chicago covering project applications pending approval and to be submitted for approval and project operations initiated subsequent to June 30, 1937.

You have expressed your concern as to the liability of the City and that of the officer executing such agreement. The reasons assigned by you for your anxiety over this subject are as follows:

(1) You have been repeatedly informed that the project proposals approved are not in any way to be construed as contracts with the Federal government.

(2) That the Presidential approval of a project proposal is simply an approval of the acceptance of the application and does not definitely allocate the necessary Federal funds as estimated, and does not obligate the government either to proceed with the project or to expend Federal funds.

(3) That on the projects in operation, you have not had direct responsibility or control of the WPA labor as to the character and amount of work which may be expected of such employees and the wages to be paid to them which are subject to change in the discretion of the Federal authorities.

(4) You have been given to understand that the Federal funds allocated to the Works Progress Administration in Chicago may be expended for labor and other costs for one or more projects approved under Presidential authority and are not earmarked separately for each project.

Under the circumstances disclosed by you, it is obvious that should the City's representative execute an agreement in the form submitted by the Works Progress Administration, the maximum liability of the City under such agreement could not possibly be ascertained. It is the established law in this State that no contract can be legally made or expense incurred by the City unless the object of the contract or expenditure shall have been included in the annual appropriation bill, unless such contract or expenditure is warranted by necessity caused by any casualty or accident happening after such annual appropriation is made (*Chicago v. Nichols*, 177 Ill 97, 101). So long as funds remain in the hands of the Treasurer, their unauthorized expenditure may be restrained at the suit of a taxpayer even though the contract has been executed by the other party. (*Litz v. Village of West Hammond*, 230 Ill 310, 315). It is a criminal offense in Illinois for any public officer to expend a greater sum of money than has been appropriated for the subject matter involved which is punishable by a fine not exceeding \$10,000 and removal from office. (*Siegel v. City of Belleville*, 349 Ill 240, 245.)

There is nothing in the proposed agreement taken together with the sponsor's proposal and the approval thereof by the Works Progress Administration upon such conditions and limitations as are described in your letter of August 17, 1937, which obligates the Federal government to expend a definite part of the cost of a non-Federal project. The only obligation is upon the sponsor to finance such part of the entire cost thereof to completion as is not supplied from Federal funds.

The effect of such an obligation is best illustrated in the City's proposal no. 163 addressed to the Works Progress Administration of Chicago for the rehabilitation of damaged curbing. In the summary of estimated costs, it appears that out of the total cost of the project of \$1,845,049.39, it is proposed that Federal funds will be available to the extent of \$1,793,134.85, and the sponsor's contributions will be \$51,915.04. Of the total cost of the project to be expended from Federal funds \$1,499,032 or 83.60 per cent is for the estimated cost of labor. If after the project is in operation and after the City's representative shall have executed the form of agreement submitted, the Federal government should change its policy and increase the wages of labor employed upon this project or should exhaust the funds allocated to the Works Progress Administration and stop short of the completion of the project, or should for any reason decide to abandon its

financial contribution to the project, the liability of the City under its agreement with the Federal government, would be increased from approximately \$52,000 to any amount approximating the total cost of the project of \$1,800,000. This contingent liability of the City is not only not provided for in the annual appropriation bill, but is probably greatly in excess of any funds that may be made available for the project in the future.

We do not believe that Congress, in passing the joint resolution making appropriations for relief purposes, intended by the language used, to impose such unreasonable obligation on the part of the sponsor of non-Federal projects. In the construction of the act of Congress referred to, it should be remembered that the declared object of the legislation is to reduce and relieve nationwide unemployment, to provide relief and work relief on useful public projects. The benefit to the States and their political subdivisions from the expenditure of Federal funds for such relief is only incidental to the primary object of the acts of Congress to encourage national industrial recovery. Bearing in mind the object of the legislation and applying the rule of reason to the language contained in Public Resolution No. 47 affecting this subject, it should be construed to require the sponsor to enter into a written agreement "to finance such part of the entire cost thereof as is not to be supplied from Federal funds" *by the terms of the sponsor's proposal approved by the Works Progress Administration*. That would limit the liability of the City in Sponsor's proposal no. 163, taken as an example, to 11.30 per cent of the estimated cost of the item of superintendence and to 88.70 per cent of the estimated cost of equipment, material, etc., both of which items of cost are reasonably within the control of the City authorities.

We, therefore, submit for your consideration, and if approved by you suggest that you forward to the District Director of the Works Progress Administration, a proposal to substitute the following form of agreement for that prepared by the Works Progress Administration.

"In consideration of expenditures of such part of the items of cost requested to be made from Federal funds in the proposal designated hereon, we ———, the sponsors, do hereby agree that we will finance such part of the entire cost thereof as is not to be supplied from Federal funds."

* * * * *

Opinion No. 9466 (1½ pp.) of March 30, 1937, and Opinion No. 9616 (1½ pp.) of September 14, 1937, both to the Commissioner of Public Works, discuss the same subject as the above opinion.

NOTIFICATION TO WPA OF ERRONEOUS DECLARATION BY CITY

(No. 9603—Commissioner of Public Works—J.F.G.—August 26, 1937—2½ pp.)

In view of the interpretation by the Works Progress Administration that the City by signing Works Progress Administration

Form 301 has obligated itself to pay such a part of the entire cost of certain sponsored projects as is not supplied from Federal funds, the City should advise the Works Progress Administration that if that interpretation is correct, the City's declaration in Form 301 is erroneous, and that the City does not intend to complete the projects concerned in the event the amount allotted from Federal funds is inadequate. If the Works Progress Administration then chooses to continue operation on the projects, it will be morally obligated to allot to the projects from Federal funds the amounts requested in the City's proposals of the projects, and if it does not choose to continue work on the projects, the City will have no legal obligation to finish the work.

LIMITATION OF CITY'S LIABILITY FOR COMPLETION OF WPA PROJECTS TO "USEFUL ECONOMIC UNITS"

(No. 9606—Commissioner of Public Works—J.F.G.—August 27, 1937—2½ pp.)

While the City's liability as sponsor of Works Progress Administration projects is limited under form of agreement P-78 to the completion of any useful economic unit of the project upon which work is being done at the time Federal funds cease, that liability in each case nevertheless will be indefinite as to each such unit. Even with this limitation, therefore, the City cannot sign the form of agreement P-78.

Citations: WPA Handbook of Procedure, Letter No. 44.
Opinion No. 9600 this (volume, p. 315).

OPINION OF FOREGOING SYNOPSIS

Since receipt by you of our letter of August 20th upon the above subject, you have again communicated with us in reference thereto under date of August 24, 1937.

In the last communication our attention is directed to the following paragraph contained in *Handbook of Procedure, Letter No. 44*, dated August 17, 1937 from the Works Progress Administration:

"The purpose of this agreement is to insure that the sponsor will comply with the terms of the project application. The agreement is limited in its application to any useful economic unit of the project upon the commencement of operations thereon."

The agreement referred to is Form P-78 in regard to which we wrote our letter of opinion of August 20, 1937. We have examined *Handbook of Procedure*, Letter No. 44 with attachments setting forth revisions and additions to the *Handbook of Procedure* (revised April 15, 1937) which we return to you herewith.

No definition or explanation is made in the documents referred to which would help us in the interpretation of the language "Useful economic unit of the project." We assume that the language refers to the possible division of any project proposal into units each of which when completed would be useful economically, independently of any work upon or completion of the remainder of the project in the proposal, so that the obligation of the sponsor after having executed form of agreement P-78, would be limited to complete only such units upon which operations were commenced with Federal funds.

We should say that such projects as the building of a scow, or the improvement of the airport, or the remodeling of the old Criminal Courts building, referred to in your letter of August 20, 1937, concerning which we have written you under date of August 26, 1937, would be a useful economic unit. If work were commenced on any one of these units with Federal funds, the City would be obligated to complete the same under form of agreement P-78 even though Federal funds allotted to the project were inadequate.

On the other hand, if the project proposal were to pave a given number of miles of streets, the pavement of any part thereof would constitute a useful economic unit. If the project were to remove streets, the repavement of any part thereof prepared by breaking up the old pavement, would constitute a useful economic unit.

It would serve no useful purpose to attempt to give further illustration of our interpretation of the paragraph contained in Letter No. 44 above quoted. While the sponsor's liability under form of agreement P-78 will be limited to the completion of any useful economic units of the project upon the commencement of operations thereon, such liability in each case nevertheless will be indefinite as to each such unit and there is no occasion for any change in our advice upon this subject given to you in our letter of August 20, 1937.²³

AGREEMENT LIMITING CITY'S LIABILITY FOR COST OF WPA PROJECTS

(No. 9609—Commissioner of Public Works—J.F.G.—September 8, 1937—2 pp.)

The form of agreement submitted by the Works Progress Administration concerning the respective liabilities of the Fed-

²³ Opinion No. 9600 (this volume, p. 315).

eral government and the City when it acts as sponsor for Works Progress Administration projects is sufficient to limit the liability of the City to the difference between the entire cost of the project as specified in its proposal of the project and the portion of the entire cost to be supplied from Federal funds as specified in the proposal. However, the agreement would not limit the City's obligation "to a proportional expense" because if the cost of the project is raised above the amount specified in the proposal, the City would be obligated to finance the entire additional cost under the form of agreement submitted.

D. OTHER CITY - FEDERAL RELATIONSHIPS

PAYMENT OF VOUCHERS IN EXCESS OF APPROPRIATION FOR WPA CONSTRUCTION

(No. 9113—City Comptroller—J.F.G.—April 3, 1936—3½ pp.)

The Comptroller may pass for payment vouchers in excess of the amount appropriated by the City Council for PWA projects out of the construction account without additional authority from the City Council.

The construction account is not exclusively a City fund, but is a joint account of the City and the United States government and subject to expenditure in accordance with the agreement between the City and the United States.

Citations:

- Cases: People v. Sergel, 269 Ill 619 (1915).
 Midland Lumber Co. v. Dallas City, 276 Ill 172 (1917).
 People v. Chicago and Alton Ry., 289 Ill 282 (1920).

Other reference: PWA form, No. 179, July 22, 1935, as amended to date.
 Council resolution, Coun. J. (1935-36), pp. 873, 1180.

OPINION OF FOREGOING SYNOPSIS

By your letter of March 13, 1936, you request our opinion as to whether you may pass for payment vouchers in excess of the amount appropriated

by the City Council for PWA projects out of the construction account, which consists of the City's share of the cost of construction of said projects as appropriated by the City Council and the Federal government grants on account of the same projects, or whether additional City Council authority is necessary for passing vouchers in excess of the amount appropriated by the City Council.

On November 26, 1935, the City Council passed a resolution accepting the offer of the United States to the city of Chicago to aid by way of grant in financing the construction of five police stations. The offer by its terms was made subject to the rules and regulations (PWA form No. 179, July 22, 1935, as amended to date) and the United States of America thereby offered to aid in financing the construction of the police stations by making a grant to the City in the amount of forty-five per cent of the cost of each project. (*Coun. J.*, 1935-36, p. 873).

PWA form No. 179 provides (General Conditions, sec. 9) that the City shall set up a separate account or accounts called a construction account in a bank or banks satisfactory to the Federal Emergency Administrator of Public Works, and that the City shall deposit in said account promptly upon receipt thereof the City's funds and the Government grants from which which construction account payments for the construction of the projects shall be made.

Section 10 of the "General Conditions" provides that monies in the construction account shall be expended only for such purpose as shall have been previously specified in a certificate of purposes filed with the Government and as shall have been approved by the Government.

In the annual appropriation bill for the year 1936, passed January 3, 1936, the City Council appropriated specific sums of money for the City's share of the cost of construction of the PWA projects referred to (*Coun. J.*, 1935-36, p. 1180).

It appears from your letter of March 13, 1936, that you have received some checks from the Treasurer of the United States which you have deposited in the construction account together with the amount appropriated by the City Council as the City's share of the cost of construction of said projects. The construction account, by the proceedings above referred to, became a special trust fund subject to disbursement as provided by the rules of PWA form No. 179 with the full consent and authority of the City Council.

In *People v. Sergel*, 269 Ill 619, it was held that no expenditure of any City funds may be made without appropriation therefor in the annual appropriation bill and that this rule applies to money which comes into the hands of the treasurer whether from taxes or miscellaneous revenues.

In *Midland Lumber Co. v. Dallas City*, 276 Ill 172, the rule was extended to money paid into the City treasury for damages to City property.

In *People v. Chicago and Alton Ry.*, 269 Ill 282, it was held that the rule was applicable to a special fund, such as a municipal tuberculosis sanitarium fund, as well as a general corporate fund.

However, in our opinion, the construction account cannot be regarded as a City fund exclusively. It is a joint account of the City and the United States government and is subject to expenditure in accordance with the agreement recorded in the proceedings hereinbefore referred to. The officers of the City are, by the agreement of the United States government and the City, the proper authorities for the disbursement of the monies in the construction account and may act as the disbursing agents for the United States government of any amount deposited to the construction account contributed by the United States, as well as the disbursing agents of the City of the funds appropriated by the City Council.

AGREEMENT WITH FEDERAL GOVERNMENT CONCERNING COAL PURCHASES

(No. 9140—*Commissioner of Public Works—J.J.S.—April 30, 1936—2 pp.*)

The Commissioner of Public Works may properly sign an agreement with the Federal government, providing for the care by the City in its hospitals of Federal government patients suffering from contagious diseases, which contains a provision that the City agrees to buy no coal for use in these hospitals from any producer who is not a member of the Bituminous Coal code.

As the City purchases coal from dealers, not producers, and dealers do not come under the provisions of the Bituminous Coal Code, this agreement cannot affect the City.

ADOPTION OF FEDERAL INSPECTION OF CANNED POULTRY

(No. 9142—*President, Board of Health—M.H.F.—April 30, 1936—4½ pp.*)

The City Council may, as an exercise of the health powers delegated to it by the State legislature, pass an ordinance adopting the inspection of the United States Department of Agriculture as the standard for canned products, including canned poultry sold in the City.

Citations:

Ordinances: Code '31: 2964, 2964A, 2964B.

Statutes: USCA, Title 21, ch. 1, 4.

U. S. Statutes-at-large, vol. 44, p. 977.

OPINION OF FOREGOING SYNOPSIS

By your communication of April 25, 1936, you invite our attention to sections 2964-A and 2964-B added to the Revised Chicago Code of 1931 by the ordinance passed March 18, 1936, which sections read as follows:

"2964-A. *Regulation of Sale of Canned Poultry and Canned Poultry Products.*) It shall be unlawful for any person, firm or corporation to pack, prepare, produce or put up for human food, or hold, sell, offer for sale or keep with the purpose of selling within the City of Chicago, any canned carcasses or parts of carcasses of chickens, ducks, geese, turkeys, or other kinds of canned poultry or any products thereof, unless the same shall have been inspected and passed as fit for consumption as human food by a duly authorized inspection of the United States Department of Agriculture.

"Each can or other container containing such canned poultry or canned poultry products shall be plainly marked, stamped or labeled on the outside of the container to show that the contents therein have been so inspected and passed by a duly authorized inspection of the United States Department of Agriculture, together with the name and address of the packer or distributor of such canned poultry and such canned poultry products.

"2964-B. *Penalty.*) Any person, firm or corporation that shall pack, prepare, produce or put up for human food, or hold, sell, offer for sale or keep for the purpose of selling within the City of Chicago, any canned carcasses or parts of carcasses of chickens, ducks, geese, turkeys or other kinds of canned poultry or any products thereof, unless the same shall have been inspected and passed as fit for consumption as human food by a duly authorized inspection of the United States Department of Agriculture, as hereinbefore provided, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

The two sections mentioned have been added to article II of chapter 60 of the Code, which article contains regulatory provisions prescribing inspection by your department of meats and other foods.

Believing that under these sections the only public authority empowered to inspect the food products mentioned is the United States Department of Agriculture and that the sections eliminate the City's Board of Health and deprive it of the right to inspect these products, you inquire, "Is such a procedure legal?"

We are unable to detect anything illegal in the two sections referred to. If the City Council, exercising the health powers delegated to it by the State legislature, sees fit to place reliance upon the United States Department of Agriculture for the inspection of certain canned products, we see nothing illegal in its doing so.

The Federal Food and Drugs act rests for its validity upon the power of Congress to legislate for the District of Columbia and the territories and on the power conferred by the interstate commerce clause; hence protection against adulterated or misbranded articles of food does not

cover canned poultry or other food articles sold in intrastate business. (Chapter 1, Title 21, United States Code Annotated.)

Neither do the United States Meat Inspection acts, requiring meat and meat food products to be inspected and passed as a condition to interstate or foreign shipment, afford protection to the City's inhabitants against deleterious poultry products processed and sold in intrastate commerce. Furthermore, meat food products are defined by the Federal law to embrace articles of food intended for human use which are derived or prepared in whole or in part from an edible portion of the carcass of cattle, sheep, swine or goats and do not include the carcasses of chickens, ducks, geese, turkeys, or other poultry. (Chapter 4, Title 21, United States Code Annotated.)

An act of Congress entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1928," approved January 18, 1927 (44 U. S. Statutes-at-large 977), authorizes the establishment of an inspection service for perishable farm products and under it the Secretary of Agriculture has prescribed and promulgated rules and regulations governing the inspection and certification of dressed poultry and edible products thereof, to be in force and effect as long as Congress shall provide the necessary authority therefor. Under such rules and regulations the Bureau of Agricultural Economics, United States Department of Agriculture, offers such inspection service in Chicago, for which it makes a charge in the form of inspection fees. (Rules and Regulations of the Secretary of Agriculture Governing the Inspection and Certification of Dressed Poultry, and Amendments.) This, we understand, is the inspection referred to in the ordinance sections above quoted.

It is doubtless true that under the sections as passed the Council has in effect adopted the inspection of the Department of Agriculture as standard and controlling and with the sections referred to a part of the municipal code it would not be practicable for the Board of Health to enforce other or different requirements.

It will be noted that section 2964, which relates to the inspection of carcasses of cattle, sheep, etc., and other meat food products, adopts the standards, rules, and regulations of the Bureau of Animal Industry of the United States government and provides that carcasses and meat food products which have been inspected and passed by the United States inspectors may be exempted from the inspection by the City meat inspectors at the discretion of the President of the Board of Health. In fact, throughout the article repeated references are made to, and reliance is placed upon, federal inspection. The matter appears to be a legislative one. If your board wishes to prescribe regulations as to canned poultry processed and packed for sale in the city of Chicago, which regulations are in addition to, or different from, those provided by the Department of Agriculture, its recommendations in our opinion should be addressed to the City Council in order that the ordinance may be amended.

E. CHICAGO HOUSING AUTHORITY

POWER OF CHICAGO HOUSING AUTHORITY TO ENTER INTO LEASE AND BORROW MONEY

(No. 9718—*Chairman, Chicago Housing Authority—A.F.G.—December 4, 1937—8½ pp.*)

The United States Housing Authority and the Chicago Housing Authority are authorized by statute to enter into a lease whereby the Chicago Housing Authority may operate the housing projects erected in Chicago by the United States Housing Authority.

The Chicago Housing Authority is empowered by the Housing Authorities act to borrow money to obtain the necessary capital to carry the housing properties held by it and meet expenses incurred prior to the receipt of rents from the projects. It may pledge the rents as security for the money it borrows and make the pledge a first lien on the rents unless some provision in the lease between the United States Housing Authority and the Chicago Housing Authority gives the United States Housing Authority a first lien on the rents.

Citations:

- Statutes:** United States Housing act (1937), sec. 1, 2, 3, 9, 10, 11, 12, 17-21.
Illinois Housing Authorities act (1934), sec. 3, 8, 27.
- Cases:** Greenwood County v. Duke Power Co., 81 F(2d) 986 (1936).
Kansas Gas and Electric Co. v. City of Independence, 79 F(2d) 32 (1935).
Ashwander v. Tennessee Valley Authority, 9 Fed Supp 800 (1935).
Missouri Public Utilities Co. v. City of California, 8 Fed Supp 454 (1934).
United States v. Certain Lands in Louisville, 78 F(2d) 684 (1935).
New York City Housing Authority v. Muller, 270 NY 333 (1936).
Spahn v. Steward, 268 Ky 97 (1937).

OPINION OF FOREGOING SYNOPSIS

This will acknowledge your letter of November 24, 1937, enclosing a copy of a memorandum of agreement between the Chicago Housing Authority and the United States Housing Authority.

You state that your body is negotiating a line of credit with a local financial institution to supply funds to cover the cost of initial occupancy,

as well as expenses incidental to bringing the property to a 95% occupancy. These funds to be repaid from the first rentals to be received.

You state also that this financial institution requires a legal opinion covering the following points:

- "1. The constitutionality of both the Federal and State acts with reference to the Chicago Housing Authority and the United States Housing Authority.
- "2. An opinion stating that both of the Housing Authorities have the power under these acts to enter into the contemplated lease arrangement.
- "3. An opinion stating that the Chicago Housing Authority has the power to borrow money up to \$50,000.00 for the purpose of supplying the Authority with required capital pending collection of the initial rents to carry the properties, and to pledge as security for such borrowing the anticipated rent collections.
- "4. An opinion that the Chicago Housing Authority can give a first lien on the rent so pledged."

We will discuss them in order.

(1) The United States Housing act of 1937, as its title indicates, was enacted at the recent regular session of Congress and was approved September 1, 1937. The policy underlying the act is declared to be in section 1 as follows:

"Section 1. It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation."

The United States Housing Authority is created by section 3 in the following language:

"Section 3. (a) There is hereby created in the Department of the Interior and under the general supervision of the Secretary thereof a body corporate of perpetual duration to be known as the United States Housing Authority, which shall be an agency and instrumentality of the United States."

The United States Housing Authority is given power to make loans to public housing agencies which are defined in paragraph 11 of section 2 of the act as follows:

"(11) The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the authority), which is authorized to engage in the development or administration of low-rent housing or slum clearance."

Such loans by section 9 are not to exceed ninety per cent of the development or acquisition cost of such project.

The United States Housing Authority may make annual contribution to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects. These contributions being contingent upon the state, city, county or other political subdivision in which such project is situated making contribution in the form of cash or tax remissions, general or special, or tax exemptions, of at least twenty per cent of the annual contribution herein provided. (Section 10).

As an alternative to the foregoing method of assistance, when requested so to do by any public housing agency, the United States Housing Authority may make capital grants for such purposes. (Section 11).

In paragraph (a) of section 12 of the act it is declared to be the purpose of Congress to provide for the orderly disposal of any low-rent housing projects hereafter transferred to or acquired by the Authority through the sale or leasing of such projects as thereafter provided.

Paragraph (b) provides that as soon as possible the United States Housing Authority shall sell its Federal projects or divest itself of their management through leases.

Paragraph (d) is as follows:

"(d) The authority may lease any Federal low-rent housing project, in whole or in part, to a public housing agency. The lessee of any project, pursuant to this paragraph, shall assume and pay all management, operation, and maintenance costs, together with payments, if any, in lieu of taxes, and shall pay to the Authority such annual sums as the Authority shall determine are consistent with maintaining the low-rent character of such project."

The financial provisions of the act are set out in sections 17 to 21, both inclusive, and provide an appropriation of \$26,000,000 for its fiscal year ending June 30, 1938, to be available to the Authority for the purposes of the act until expended.

The United States Housing Authority is also authorized to issue obligations, in the form of notes, bonds, or otherwise which it may sell to obtain funds for the purpose of the act. The Authority may issue such obligations in an amount not to exceed \$100,000,000 on or after the date of enactment of the Act, an additional amount not to exceed \$200,000,000 on or after July 1, 1938, and an additional amount not to exceed \$200,000,000 on or after July 1, 1939. These obligations are fully and unconditionally guaranteed upon their face by the United States as to the payment of both principal and interest and are exempt from all taxation (except surtaxes, estate, inheritance, and gift taxes) by the United States or by any state, county, municipality, or local taxing authority.

Insofar as we have been able to find, no court has passed on the validity of this act. However, the courts have sustained the validity of certain parts of the National Industrial Recovery act which had the same underlying purpose as the United States Housing act of 1937; that is, to authorize the expenditure of public funds to provide employment in emergency

and to provide a comprehensive program of public works including "construction, reconstruction, alteration or repair under public regulation or control of low-cost housing and slum clearance projects."

Greenwood County v. Duke Power Co., 81 F(2d) 986

Kansas Gas and Electric Co. v. City of Independence, 79 F(2d) 32

Ashwander v. Tennessee Valley Authority, 9 Fed Supp 800

Missouri Public Utilities Co. v. City of California 8 Fed Supp 454

In the case last cited which involved a grant of money by the United States to a municipality for the construction of an electric plant, the court said:

"My conclusion is that Congress has the power to appropriate money for the promotion of the general welfare and that it is not restricted in doing so to objects germane to its other delegated powers. Congress, therefore, has the power to appropriate money for the relief of any condition of unemployment which is not merely local but is national in its extent and hence inimical to the general welfare."

The only provision of the National Recovery act insofar as it applied to low-cost housing and slum clearance which was held unconstitutional by the courts was the provision which attempted to authorize the National Government to condemn private property for low-cost housing and slum clearance for the reason that such a use is not a "public use" within the meaning of the Constitution.

United States v. Certain Lands in City of Louisville, Ky., 78 (2d) 684

The United States Housing act of 1937 contains no provision authorizing the exercise of eminent domain for the purposes of the act.

In the absence of any authoritative decision of a court of competent jurisdiction as to the constitutionality of the United States Housing act of 1937, any opinion which we might venture upon the subject would be a mere guess and we suggest that an opinion upon this subject should be secured by you from the Attorney General of the United States.

Section 3 of the Housing Authorities act approved March 19, 1934, as amended, provides for the creation of housing authorities in cities, villages, and incorporated towns of more than 25,000 inhabitants, and the appointment by the presiding officer of such city, village, or town of five commissioners with the approval of the State Housing Board.

The purpose of these corporations is to bring about the gradual demolition of existing unsanitary and unsafe housing and the construction of new housing facilities under public supervision with proper standards of sanitation and safety and at a cost which will permit monthly rentals or charges which wage earners can afford to pay.

The validity of similar housing authority acts have been upheld in New York and Kentucky respectively in

New York City Housing Authority v. Muller, 270 NY 333

Spahn v. Steward, 268 Ky 97

(2) The power of the United States Housing Authority of 1937 to enter into the contemplated lease with the Chicago Housing Authority is found in subparagraph (d) of section 12 of the act of Congress which is as follows:

"(d) The Authority may lease any Federal low-rent housing project, in whole or in part, to a public housing agency. The lessee of any project, pursuant to this paragraph, shall assume and pay all management, operation, and maintenance costs, together with payments, if any, in lieu of taxes, and shall pay to the Authority such annual sums as the Authority shall determine are consistent with maintaining the low-rent character of such project."

The power of the Chicago Housing Authority to enter into the contemplated lease with the United States Housing Authority is found in sections 8 and 27 of the State Housing Authorities act.

Section 8 provides in third paragraph that the Authority shall have power "to take over by purchase, lease, or otherwise, any project undertaken by any government;"

Section 27 provides that:

"In addition to the powers conferred by other provisions of this Act, an Authority shall have power * * * to purchase, take over, lease or manage any housing facilities, project or undertaking constructed or owned by the Federal government * * * and to these ends, to comply with such conditions and enter into such trust indentures, leases or agreements as may be necessary, convenient or desirable."

We are of the opinion therefore that both the United States Housing Authority and the Chicago Housing Authority have apparent power under the acts creating them to enter into the lease referred to.

(3) Section 8 of the Housing Authorities act in the fifth paragraph provides that an Authority shall have power

"To borrow money upon its bonds, notes, debentures, or other evidences of indebtedness and to secure the same by pledge of its revenues or in any other manner."

We are of the opinion that the foregoing provision empowers the Chicago Housing Authority to borrow money to secure the necessary capital to carry the properties and meet the expenses incurred prior to the receipt of rents and also empowers the Authority to pledge these rents as security for such loans. As the amount which may be borrowed is not limited in the provision quoted above, we are of the opinion that the Authority may borrow up to \$50,000 if such sum is necessary to carry on the preliminary work of operating these projects.

(4) From the provision referred to in, and what was said in our answer to question 3, we are of the opinion that, as the Chicago Housing Authority has power to pledge its rents as security for loans, it may make such pledge a first lien on the rents so pledged unless some provision in the lease between the United States Housing Authority and the Chicago Housing Authority gives the United States Housing Authority a first lien on the said rents.

LIABILITY OF HOUSING COMMISSIONERS IN SIGNING FEDERAL LEASE

(No. 9730—*Chairman, Chicago Housing Authority—A.F.G.—
December 22, 1937—2½ pp.*)

No personal liability will attach to the members of the Chicago Housing Authority in signing a lease with the United States Housing Authority as both authorities are authorized by their respective statutes to execute the lease, and the Chicago Housing Authority has evidenced caution by submitting the lease to counsel for advice.

A municipal officer is not liable to private suit for his acts done with care in the honest performance of his corporate duties.

Citations: 43 CJ 1198.

McQuillin, *Municipal Corporations* (2nd ed.), v. 2, sec. 556, 560.

LEASE FORM OF CHICAGO HOUSING AUTHORITY

(No. 9716—*Chairman, Chicago Housing Authority—A.F.G.—
December 3, 1937—2 pp.*)

The Federal government does not require that the Chicago Housing Authority use its Dwelling Lease Form PWH 5-162 for Federal projects leased, but merely requires that a form be used which meets with its approval.

No. 10 Form B, Apartment Lease, which is commonly used in Chicago may be used by the Chicago Housing Authority, and the Chicago Housing Authority, if it so desires, may insert in that lease form the statutory requirement that families renting dwellings from the Chicago Housing Authority must be of certain low income classes.

Citation: United States Housing act.

PAYMENT OF CHICAGO HOUSING AUTHORITY EXPENSES FROM INCOME OF FEDERAL PROJECT

(No. 9722—*Chairman, Chicago Housing Authority—A.F.G.—
December 8, 1937—21½ pp.*)

The Chicago Housing Authority may not distribute reasonable costs of its activities against the income received from any Federal project leased by it unless the lease so authorizes, as the statutory authority for an allocation of administrative expenses applies only to the projects constructed or operated by the Chicago Housing Authority as its own property and does not apply to property leased by the Authority from the United States government.

The lease submitted shows no allowable item, covering any of the overhead expenses in the general administration of the Chicago Housing Authority, which may be allocated to the Federal project being leased by the Chicago Housing Authority except salaries and expense of tenant selection after November 19, 1937.

Citation: Housing Authority act, sec. 7.

APPLICATION OF SOCIAL SECURITY ACT TO CHICAGO HOUSING AUTHORITY EMPLOYEES

(No. 9720—*Chairman Chicago Housing Authority—A.F.G.—
December 7, 1937—21½ pp.*)

The Chicago Housing Authority is an instrumentality of the State created by statute to exercise a governmental function. Its employees, therefore, are exempt from the provision of the Social Security act as that act by its terms does not extend to employees of a State, a political subdivision of a State or an instrumentality of one or more States or political subdivisions.

Citations:

Statute: USCA, title 42, ch. VII, sec. 1001, 1004.
Housing Authorities act, sec. 8.

Cases: New York City Housing Authority v. Muller, 270 NY 333 (1936).
Spahn v. Stewart, 268 Ky 97 (1937).

SECTION II

MANAGEMENT OF THE CITY AS A CORPORATION

CHAPTER X

FINANCE

A. TAXATION

VALIDITY OF TAX LEVY FOR LIBRARY SITES AND BUILDINGS

(No. 9361—*Secretary, Chicago Public Library—J.F.G.—December 9, 1936—4 pp.*)

The levy of a tax of one-tenth mill per dollar for the purchase of sites and buildings and for the construction and equipment of buildings for library purposes made by the City Council for 1936 is valid notwithstanding an amendment to the authorizing act in 1935, and a similar levy may be made for the year 1937.

Citations:

Statute: Ill. Laws (1935), p. 941.

Case: Illinois Bell Telephone Co. v. Ames, 364 Ill 362 (1936).

OPINION OF FOREGOING SYNOPSIS

We have your letter of December 7, 1936, requesting an opinion on the validity of the tax levy of one-tenth of a mill on the dollar for the purchase of sites and buildings and for the construction and equipment of buildings for library purposes made by the City Council for the year 1936.

The validity of this tax levy is questioned by reason of the amendment to the Library act in 1935 which was designed to increase the maximum tax rate *for maintenance and operation* for the years 1935, 1936 and 1937 from six-tenths of one mill on the dollar of the assessed valuation to three-quarters of one mill on the dollar of such valuation, or at such rate which will produce when extended an amount not to exceed \$1,800,000, whichever may be greater, and to increase the maximum tax rate for the year 1938 and thereafter to three-quarters of a mill on each dollar of such valuation without any alternative whatsoever.

The 1935 amendment (Ill. Laws, 1935, p. 941) is indicated by underscoring the language substituted and added to the law as it existed just prior to the amendment. As amended, that portion of section 1 of the Library act which relates to the power to levy a tax reads as follows:

" * * Provided, that in cities of over one hundred and fifty thousand inhabitants, such tax shall not exceed for the years 1935, 1936 and 1937, three-quarters of one mill on the dollar of the assessed valuation; or at such rate which will produce, when extended, an amount not to exceed one million eight hundred thousand dollars (\$1,800,000) whichever may be greater; and for the year 1938 and thereafter three-quarters of one mill on each dollar of the assessed valuation annually for maintenance and operation and an additional tax of one-tenth (1/10) of a mill on the dollar annually for the purchase of sites and buildings and for the construction and equipment of buildings, for library purposes, such tax to be levied and collected in like manner with the general taxes of said city, and to be known as a library fund * * *."*

Prior to the adoption of the 1935 amendment the provision referred to read as follows:

" * * * Provided, that in cities of over one hundred and fifty thousand inhabitants, such tax shall not exceed for the year 1929 and for each year thereafter six-tenths (6/10 of one (1) mill on the dollar annually for maintenance and operation and on additional tax of one-tenth (1/10) of a mill on the dollar annually for the purchase of sites and buildings and for the construction and equipment of buildings, for library purposes, such tax to be levied and collected in like manner with the general taxes of said city, and to be known as a library fund * * *."*

The language underscored in the first quotation was substituted for the language underscored in the last quotation.

It will readily be seen by comparison of the law, as amended, with the law as it existed prior to the amendment that no change was made in the provision authorizing the levy of a tax of one-tenth of a mill for the purchase of sites and buildings, etc. Prior to the amendment such tax was authorized to be levied for the year 1929 and for each year thereafter. It is clear that by the amendment it was intended to increase the tax rate for maintenance and operation only for the year 1935 and thereafter.

Those who question the validity of the tax levy for the purchase of site and buildings, etc., for the years 1936 and 1937 support their claim upon the fact that semicolons separate the clauses inserted by amendment so that the authority for an additional one-tenth of a mill tax for the purchase of sites and buildings, etc., by strict grammatical rule relates only to the year 1938 and thereafter. That would, in our opinion, distort the meaning of the entire proviso because the language "for maintenance and operation" is in the same clause as the language "for the purchase of sites and buildings." If the annual tax for maintenance and operation relates to the years 1935, 1936, and 1937, the annual tax for the purchase of sites and buildings by parallel construction must also relate to those years. If the semicolon is to be given the weight contended

for, the annual tax for maintenance and operation for the years 1936 and 1937 might also be questioned.

In the very recent case of *Illinois Bell Telephone Co. v. Ames*, 364 Ill 362, our court said (p. 368):

"* * * It is a rule long since adopted in this State that in the construction of a statute its punctuation is to be considered and given weight unless from inspection of the whole act it is apparent it must be disregarded in order to arrive at the intention of the legislature. (*Smith v. County of Logan*, 284 Ill. 163; *Commissioners of Highways v. Ellwood*, 193 id. 304.) Punctuation, however, may not be resorted to when there is no real ambiguity except what the punctuation itself creates. In other words, the punctuation should not be allowed to obscure what is otherwise clear and unambiguous language of the statute. Punctuation is not entitled to weigh evidence of legislative intention as against considerations which demonstrate the intention of the legislature. *Barrett v. Van Pelt*, 269 US 85; *Dunn and Sons v. Broger*, 81 Atl. (Md.) 516."

The argument against the validity of the tax levy for the purchase of sites and buildings, etc., for the year 1936 based upon semicolons alone is specious in the light of the clear intention of the legislature in the enactment of the amendment of 1935.

We are of the opinion that the tax levy for 1936 referred to is valid and that you have the undoubted right to levy a similar tax for the year 1937.

INTERPRETATION OF ACT PROHIBITING RECORDING OF PLAT OF TAX DELINQUENT LAND

(No. 9672—*Commissioner of Public Works*—A.A.S.—October 26, 1937—4½ pp.)

In House bill 434 which provides that no plat of any subdivision, vacation, or dedication of any tract of land shall be approved or recorded unless the County Clerk has endorsed the plat, showing that he finds no delinquent general taxes, *unpaid current general taxes*, delinquent special assessments, and unpaid current special assessments against the land described in the plat, the phrase *unpaid current general taxes* should be interpreted as applying to the taxes for the year which are currently payable as distinguished from the taxes which are delinquent.

House bill 434 also provides that no municipal officer shall approve any plat of any subdivision of a tract of land until all

deferred installments of outstanding unpaid special assessments have been either certified as paid by the proper collector or a division of the tract has been made in accordance with the proposed subdivision and duly approved by the court that confirmed the special assessment. As on August first of each year the City Collector turns over to the County Collector his books showing delinquent installments of special assessments, after that date the County Collector would be the proper collector to make the certificate so required.

The words *all deferred installments of outstanding unpaid special assessments* in House Bill 434 seem to require that all of the installments, no matter what their number, must be paid in full, even though only the first of the installments is due, if a division of the tract of land has not been made and approved by the court that confirmed the special assessment.

Citations:

- Statute: House Bill 434, Ill. Laws, 1937, p. 1026.
Act for the assessment of property and for the levy and collection of taxes (1872).
- Cases: Murphy v. St. Mary's Parish Police Jury, 118 La 401 (1906).
Clark v. Lancaster County, 69 Neb 717 (1903).
Pittsburg, Cincinnati, Chicago, and St. Louis Ry. v. Clark County Treasurer, 78 Oh St 227 (1908).

OPINION OF FOREGOING SYNOPSIS

Your letter of July 23, 1937, relative to House Bill No. 434, addressed to the Honorable Barnet Hodes, Corporation Counsel, has been referred to the writer for answer.

Under this bill which amends section 62 of "An Act for the assessment of property and for the levy and collection of taxes," approved March 30, 1872, it is provided that, " * * * no plat of any subdivision, vacation or dedication of any tract of land shall be approved by a city, incorporated town or village officer, nor shall any recorder of deeds record any such plat unless a statement from the county clerk is endorsed thereon showing that he finds no delinquent general taxes, unpaid current general taxes, delinquent special assessments and unpaid current special assessments against the tract of land described in said plat."

You have requested an opinion as to our interpretation of the word "current" used in connection with the phrase "unpaid current general taxes." In the case of *Murphy v. St. Mary's Parish Police Jury*, 118 La 401, it was held that the words "current year" used in a statute providing that a police jury before fixing the taxes for the "current year" shall estimate expenditures and publish the same, related to the year in which the taxes are levied and assessed.

It was held in the case of *Clark v. Lancaster County*, 69 Neb 717, that under a statutory limitation on the power of the County board to contract for bridge building, to cost a sum of not greater than the amount of money on hand in the County bridge fund, derived from a levy of previous years and two-thirds of the levy of the current year, that the terms "previous year" and "current year" do not refer to the previous calendar year or the current calendar, but to the year from one levy to another.

It was also held in the case of *Pittsburg, Cincinnati, Chicago, and St. Louis Ry. v. Clark County Treasurer*, 78 Oh St 227, that the expression "current year" used in the statute of Ohio, authorizing the County Auditor, on discovery of any omitted real estate, to add to the taxes of a "current year" the taxes which have been omitted for the preceding years, meant the "current tax year" and not the "current calendar year."

Since the general taxes for the current year for which taxes have been levied cannot be paid until such taxes are extended by the County Clerk and the books have been turned over to the County Collector as provided by law, we must interpret the term "unpaid current general taxes" in line with the foregoing cases as the taxes for the year which are currently payable as distinguished from the taxes which are delinquent. Any other interpretation would, in our opinion, make impossible the subdivision, vacation, or dedication of any tract of land, and to that extent the statute would unreasonably interfere with the ownership and right to alienate the lands affected and would constitute a taking of property without due process of law in violation of the constitutions of the United States and the state of Illinois.

The amendment also provides the following: "Provided further, that no officer of a city, village or incorporated town shall approve the plat of any subdivision of any tract of land until all deferred installments of outstanding unpaid special assessments have been either certified as paid by the proper collector or a division thereof, in accordance with the proposed subdivision, has been made and duly approved by the court that confirmed the special assessment."

You have asked whether or not this amendment requires the certificate of the County Treasurer after August 1st of any year. On August 1st of each year the City Collector turns over to the County Collector his books showing delinquent installments of special assessments, after which date the County Collector, in our opinion, would be the proper collector to make the necessary certificate provided for in the act.

You have also inquired as to the meaning of the words "* * * * all deferred installments of outstanding unpaid special assessments * * * *" and have asked the following question: "Does this mean that all five special assessment installments must be paid even though only the first installment bill is issued?" As we read this statute it seems that all of the installments, whether five or ten, or any other number, must be paid in full, even though only the first of said installments is due, in the event a division thereof has not been made and duly approved by the court that confirmed the special assessment.

We have inquired as to the purpose of this amendment and have been advised that under the act before this amendment subdividers would obtain the certificate of the County Clerk to the effect that he did not find any redeemable tax sales or unpaid forfeited taxes against any of the real estate included in the plat. Real estate salesmen would then show this certificate on the plat to the prospective buyers who were led to believe that all taxes against the property had been paid, whereas, the County Clerk merely certified that he found no redeemable tax sales or unpaid forfeited taxes against the property. The amendment was made to protect purchasers of subdivision lots.

TWO PER CENT TAX ON FIRE INSURANCE²⁴

(No. 9459—City Comptroller—O.S.F.—March 16, 1937—4 pp.)

All foreign fire insurance companies which write fire insurance in the City, regardless of whether they are incorporated as fire insurance companies in the state of their domicile, are required to pay the two per cent Fire department tax on premiums collected on fire insurance policies written on property within the City.

It is unlawful for any foreign fire insurance company to write fire insurance on property within the City while defaulting on the two per cent Fire department tax, and such a company can be enjoined from transacting business while the default exists.

Citations:

Statute: ISBS '35, 24: 1036.

Ordinance: Code '31: 3438-3440, 3443.

OPINION OF FOREGOING SYNOPSIS

In reply to your letter of March 10, 1937, concerning the claim of the Ohio Casualty company, Hamilton, Ohio, with an office at 175 W. Jackson boulevard, Chicago, for exemption from paying the two per cent Fire department tax on fire insurance premiums collected, we are of the opinion that said company is required to pay said tax on all fire insurance premiums collected on all fire insurance policies written on property within the city of Chicago.

²⁴ To aid in the collection of this tax, the City Comptroller has been given power to examine books, records, and other papers and documents of foreign fire insurance agents or companies doing business in Chicago. (Ill. Laws, 1937, p. 341).

The City's right to collect said tax is based on a statute entitled "An Act to enable cities, towns and villages organized under any general or special law to levy and collect a tax or license fee from foreign fire insurance companies for the benefit of organized fire departments." (Illinois State Bar Statutes, 1935, chap. 24, par. 1036). While the title to said act mentions "*foreign fire insurance companies*," section 1 of the act provides "*all corporations, companies, and associations* not incorporated under the laws of this State, * * * *in effecting fire insurance*, shall pay to the treasurer of the city * * * for the maintenance of the fire department thereof, a sum not exceeding two per cent of the gross receipts by their agency in such city * * *."

In our opinion the intent of the legislature was to tax all foreign corporations writing fire insurance in this State, regardless of whether they were incorporated as fire insurance companies in the state of their domicile. In our opinion foreign casualty companies writing insurance in Illinois are within said statute.

Sections 3438, 3439 of the Revised Chicago Code of 1931 enacted pursuant to said statute provide as follows:

"It shall be unlawful for any corporation, company or association not incorporated under the laws of the state of Illinois, to engage in the city in effecting fire insurance, or to transact any business of fire insurance in said city while in default by not fully complying with the requirements of this chapter, and such disability shall continue until such requirements shall have been fully complied with; but this provision shall not relieve any company, corporation or association from the payment of any risk that may be undertaken in violation of this chapter.

"Any such corporation, company or association not incorporated under the laws of the state of Illinois which is engaged in the city in effecting fire insurance, shall annually pay to the City Collector, for the maintenance, use and benefit of the fire department of the city, a sum of money equal in amount to two per cent per annum of the gross receipts received for premiums by any and all agents of any such corporation, company or association during the year ending on the first day of July, for any insurance effected or agreed to be effected in said city by or with any such corporation, company or association during such year."

It is significant that in the aforesaid ordinance the City Council made said ordinance apply to *all* foreign corporations, companies, or associations engaged in effecting fire insurance in the city of Chicago. Otherwise, many corporations writing fire insurance would escape said tax entirely.

Sections 3440 and 3443 of the aforesaid ordinance provide as follows:

"Every person acting in the city as agent for, or on behalf of, any such corporation, company, or association shall, on or before the fifteenth day of July of each year and every year, render to the comptroller a full, true and just account, verified by his oath, of all premiums which, during the year ending on the first day of July preceding such report, shall have been received by him, or any other person for him, in behalf of any such corporation, company or association. Such agent shall also at the

time of rendering the aforesaid report pay to the city collector the sum of money for which such company, corporation or association, represented by him, is chargeable, by virtue of the provisions of this chapter.

"The sum of money for which such company, corporation or association is so chargeable may be recovered of it, or its agent or agents, by an action in the name of and for the use of the city of Chicago, as for money had and received.

"Nothing in this section shall be held to exempt any person, corporation, company or association from indictment and conviction under the provision of an act entitled 'An Act to enable cities, towns and villages, organized under any general or special law, to levy and collect a tax or license fee from foreign insurance companies for the benefit of organized fire departments,' in force July 1 1895.

"No insurance broker in the city shall place any insurance with any company, association or corporation not incorporated under the laws of this state which shall be in default for not reporting or making payment as hereinbefore provided, until it shall have complied with all the requirements of this chapter.

"Any person violating any of the provisions of this chapter shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense."

It is to be noted that section 1 of said ordinance makes it unlawful for any foreign corporation, company or association to engage in the City in effecting fire insurance while in default in not fully complying with the ordinance, and hence any foreign corporation can be enjoined from transacting business if all past and present taxes have not been paid.

FIRE DEPARTMENT TAX ON INTERINSURANCE EXCHANGE AND ON MARINE POLICIES²⁵

(No. 9182—City Comptroller—F.V.M.—May 25, 1936—81½ pp.)

Groups operating as interinsurance exchanges are not subject to the payment of the two per cent Fire department tax to the City on fire insurance premiums collected on properties in the City.

The two per cent Fire department tax cannot be collected by the City on premiums of marine insurance policies unless the premiums for fire insurance can be separately specified.

²⁵ See footnote 24, p. 340.

Citations:

Statute: ISBS '35, 24: 1036; 73: 42.

Cases: *Alyea-Nichols Co. v. United States*, 12 F(2d) 998 (1926).

Fidelity Co. v. Board of Revenue, 264 Ill 11 (1914).

People v. Barrett, 309 Ill 53 (1924).

Michigan Millers Mutual Fire Insurance Co. v. McDonough, 358 Ill 575 (1935).

People v. Commercial Union Fire Insurance Co., 322 Ill 326 (1927).

Concordia Fire Insurance Co. v. People, 54 Sup Ct 830 (1934).

OPINION OF FOREGOING SYNOPSIS

In reply to your letter in which you request an opinion as to whether "groups operating as interinsurance exchanges are subject to the payment of the two per cent fire department tax to the city of Chicago on fire insurance premiums collected on properties here," please be advised as follows:

The so-called Fire Department Tax act, chapter 24, section 1036, Illinois State Bar Association Revised Statutes, 1935, contains the following paragraph:

"All corporations, companies and associations not incorporated under the laws of this State, and which are engaged in any city, town or village organized under any general or special law of this State, in effecting fire insurance, shall pay to the treasurer of the city, town or village for the maintenance, use and benefit of the fire department thereof, a sum not exceeding two per cent of the gross receipts received by their agency in such city, town or village * * *.

Referring to "an Act concerning the business of reciprocal interinsurance," approved June 20, 1921, and in force July 1, 1921, chapter 73, section 42, Illinois State Bar Association Revised Statutes, 1935 after setting out the authority of individuals, partnerships, and corporations of this State, designated as "subscribers," to exchange reciprocal or interinsurance contracts with each other and so forth, the following language is used:

"Such contracts, and the exchange thereof, and such subscribers, their attorneys-in-fact and representatives, shall be regulated by this Act and by no other law relating to insurance unless such law is referred to in this Act, and no law hereafter enacted shall apply to them unless they be expressly designated therein * * *."

Alyea-Nichols Company v. United States; *Alyea-Nichols Company v. Pickering*, 12 F (2d) 998, were actions in assumpsit, brought by plaintiff against defendants, to recover revenue taxes which had been levied and assessed against "Belt Automobile Indemnity Association," a reciprocal or interinsurance exchange, established in accordance with the laws of the state of Illinois, upon schedules which plaintiff was required by the revenue officers of defendants to fill out and file.

It was claimed by plaintiff that the taxes sought to be recovered were wrongfully, erroneously, illegally and unjustly assessed against "Belt Automobile Indemnity Association," and collected through duress and under protest from the Alyea-Nichols company, the attorney in fact, from funds in its hands of the individual subscribers, respectively, exchanging contracts of indemnity at the interinsurance exchange. The Federal government claimed that the taxes were legally assessed against "Belt Automobile Indemnity Association," upon the authority of law opinion 1063, which holds in effect that the exchange ("Belt Automobile Indemnity Association") constituted a mutual insurance company, and these suits were defended on this theory.

In this case the court said:

(p. 1003). "As a general rule, revenue laws such as laws imposing taxes and licenses, are neither remedial laws, nor laws founded upon any permanent public policy; but, on the contrary, operate to impose burdens upon the public, or to restrict them in the enjoyment of their property and the pursuit of their occupations, and are therefore construed strictly. The provisions of such statutes are not to be extended beyond the clear import of the language used; in order to sustain the tax, it must come clearly within the letter of the statute, and the powers granted to officers charged with its execution must be strictly pursued. 36 Cyc. 1189."

(p. 1004). "On behalf of the government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211. * * *

(p. 1009). "* * * In the light of these considerations, we conclude that the plaintiff is a proper plaintiff; that the taxes collected did not come within the provisions of the several sections of the statutes here involved; that the plaintiff before suit, exhausted all of the remedies provided by the statute, in and about an effort to have the taxes refunded; and that the plaintiff is entitled to recover."

Referred to therein was the case of *Harry B. Clark v. W. Stanley Smith*, as Commissioner of Insurance of the state of Wisconsin (unreported memorandum decision), (p. 1007) which was a suit in the United States District Court for the Western District of Wisconsin, to recover certain statutory fees which the commissioner of insurance had collected from the plaintiff, the attorney in fact for subscribers located in and out of the state of Wisconsin, for reciprocal or interinsurance among subscribers at his exchange. In passing upon the character of the business in which the subscribers and the attorney in fact were engaged, Judge Luse reviewed the statute governing interinsurance for the state of Wisconsin, and in many respects it resembles that of Illinois, both section 13½ of the

Casualty act of 1905, as added in 1912, and the act of 1921. Judge Luse said:

"Sec. 201.39 (Stat. Wis. 1925) also contemplates that a 'name or designation under which such contracts are issued' may be adopted. Thus in this business of interinsurance we have a group of subscribers sharing losses under terms of contracts among themselves, entered into through an attorney in fact. The result certainly is not a company in the generally accepted sense; neither a corporation, nor voluntary association. * * * Furthermore, it is clear that the subscribers to a reciprocal are not engaged in the business of insurance except incidentally."

From the foregoing, we are of the opinion that groups operating as inter-insurance exchanges are not subject to the payment of the two per cent Fire department tax to the city of Chicago on fire insurance premiums collected on properties here.

In the same letter you stated that you "would like to be advised also whether any tax should be paid on marine policies, as they also protect against loss by fire as well as the other hazards" and we now reply to that part of your letter.

In *Fidelity Company v. Board of Revenue*, 264 Ill 11, the court said:

(p. 17). " * * * It was undoubtedly within the province of the legislature to have required foreign insurance companies like appellant to pay taxes on their net receipts, but in our opinion it did not do so. Net receipts of foreign insurance companies not being taxable under the general revenue Act, the authority to impose such tax, which is in the nature of a special tax, must be found in some other act in clear and unambiguous language. If there is any doubt whether the language of an act was intended to authorize the taxation of certain property, the language of the act will not be extended beyond its clear import in order to make the property subject to the tax. In case of doubt such statutes are construed most strongly against the government and in favor of the citizen. *People v. Griffith*, 245 Ill. 532; *Hopkins v. People*, 174 id. 416; *United States v. Wigglesworth*, 2 Story, 369; *Hartranft v. Wiegmann*, 121 U. S. 609; *Eidman v. Martinez*, 184 id. 578."

In the case of *People v. Barrett*, 309 Ill 53, the court said:

(p. 61). "In 25 R. C. L. it is said on page 1092: 'A tax cannot be imposed without clear and express words for that purpose, and where there is any ambiguity or doubt it must be resolved in favor of the person upon whom it is sought to impose the burden. It is to be fairly and justly presumed that the legislature, which possesses a power so comparatively unrestrained in its force and searching in its extent as the power of taxation, has so shaped the law, as without ambiguity or doubt to bring within it everything that it was meant should be embraced.' Again, in *Cooley on Taxation* (vol. 1, 3d ed. p. 454), the author quoted with approval from *Potter's Dwaris on Statutes and Constitutions*, (1871 ed., p. 255), as follows: 'Acts of Parliament which impose

a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that where the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown.' This same doctrine is approved in substance, in 36 Cyc. 89 and also by the standard recognized authorities.

"It is not a function of the court to extend the application of statutes of this character. 'Our entire revenue system is created by and depends upon the statute for its force and vitality.' *People v. Smith*, 94 Ill. 226. To the same effect are 37 Cyc. 724, and 29 id. 1431. See, also, the reasoning in *Wheeler v. County of Wayne*, 132 Ill. 599, and *People v. Kent*, 300 id. 324."

In *Michigan Millers Mutual Fire Insurance Company v. McDonough*, 358 Ill 575, 586, the court quoted from *Concordia Fire Insurance Company v. People of the State of Illinois*, 78 L Ed (U. S.) 1006, 54 Sup Ct 830 in which the court said:

"* * * This statement shows that section 30, as the State court construes and applies it, works a very real and prejudicial discrimination against the fire insurance companies and in favor of the casualty companies in respect of competitive casualty businesses of the same character, conducted in the same way and in the same territory. The companies are all foreign corporations, and all are for present purposes equally within the jurisdiction of the State and subject to her power to tax. There is no basis or reason for making a distinction between them that has any pertinence to the imposition of a property tax such as is in question. The net receipts which are taxed are not different from those which are not taxed; and both come from the same source. Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary. In principle it is not different with the net receipts. They are property and the tax which section 30 imposes is, as the State court holds, a property tax. It follows that the section, when construed and applied in the way just described, is in conflict with the equal protection clause of the constitution."

The court then said:

"The appellants are foreign fire insurance corporations and by virtue of their licenses are authorized to do business in this State. Foreign fire and foreign casualty insurance corporations, when writing the same types or classes of insurance, are in direct competition with each other and are alike entitled to the equal protection of the laws. The exercise of the same lawful power or authority by foreign fire and foreign casualty insurance corporations does not justify the taxation of the resulting net receipts of the former and not of the latter. The taxes in question were levied upon the net receipts of the appellants from all types of insurance. To the extent that these taxes were laid upon their net receipts from insurance other than fire, marine and inland

navigation, they result in a discrimination against the appellants and are *pro tanto* invalid. Section 30 of the Fire, Marine and Inland Navigation Insurance Companies act, when so applied, arbitrarily discriminates against the insurance corporation subjected to the illegal portion of the taxes imposed and, by denying the equal protection of the laws and granting a special privilege or immunity to a particular class transcends, to the extent indicated, the Federal and the State constitutions."

Referring again to the Fire Department Tax act, chapter 24, section 1036, Illinois State Bar Association Revised Statutes, 1935, we again quote the following therefrom:

"All corporations, companies and associations not incorporated under the laws of this State, and which are engaged in any city, town or village organized under any general or special law of this State, in effecting fire insurance, shall pay to the treasurer of the city, town or village for the maintenance, use and benefit of the fire department thereof, a sum not exceeding two per cent of the *gross receipts received by their agency* in such city, town or village; * * *"

It is reasonable to assume that marine insurance companies if presumed to be subject to the above act could be assessed a tax of two per cent of the gross receipts from all insurance effected by them of which only a part would be fire insurance, which would be discriminatory against the marine insurance companies.

In the case of the *People v. Commercial Union Fire Insurance Company*, 322 Ill 326, 336, the court said:

"* * * It is also urged that the act requiring this report does not apply to premiums collected for fire insurance on policies combining such insurance with that covering the loss by perils of navigation, where such policy is covered by one premium. We think this contention also should be sustained. The Act of 1895, by the language of its title, applies only to foreign fire insurance companies, and we think it is not intended to apply to contracts of marine insurance, though they may involve insurance against fire, unless the premiums for fire insurance can be separately specified."

We are of the opinion therefore that the two per cent fire department tax cannot be collected on premiums of marine policies unless the premiums for fire insurance can be separately specified.

B. MANAGEMENT OF CITY FUNDS

PURCHASE AND SALE OF SECURITIES BY CITY COMPTROLLER AND CITY TREASURER

(No. 9596—*City Comptroller—J.F.G. — August 18, 1937—*
21½ pp.)

The City Comptroller and the City Treasurer have unlimited authority to pay any price for bonds or other interest bearing obligations of the United States and the state of Illinois in which City funds are required to be invested, and may purchase such securities at a premium if in their judgment it is for the best interest of the City.

In the purchase of municipal securities of the City, the City Comptroller and the City Treasurer may not pay more than the par value of the securities plus the interest which has accrued on them.

The City Comptroller and the City Treasurer may sell any securities, when necessary to provide sufficient money for immediate needs, at not less than their par value and accrued interest, unless otherwise authorized by the City Council.

Citations:

Statute: ISBS '35, 24: 1001.

Ordinances: Code '31: 100, 104.

OPINION OF FOREGOING SYNOPSIS

We have your letter of August 9, 1937, acknowledging receipt of the draft of an ordinance amending the Revised Chicago Code of 1931 which permits the Comptroller and Treasurer to invest City funds in bonds or other interest bearing obligations of the United States and state of Illinois. You request our advice as to whether the Comptroller is authorized by the terms of the amending ordinance or by statutory or other law, to purchase such securities at a premium.

The statutory authority for the adoption of the proposed ordinance is found in the act concerning municipal funds approved June 5, 1911 (Illinois State Bar Statutes, chap. 24, par. 1001, p. 704). Authority is thereby given to the City Council by ordinance to invest funds not immediately necessary for the purpose for which they have been set aside in bonds and other interest bearing obligations of the United States or of the state of Illinois. Pursuant to this authority, the proposed ordinance authorizes

the Comptroller and the Treasurer, not the Comptroller alone, to purchase such securities. If it is desired that the authority shall be in the Comptroller alone, the proposed ordinance would have to be amended by eliminating the words "and treasurer" in sections 97, 98, 101, and 104 of the Code.

There is nothing in the present Code or in the proposed amendment to the Code which limits the authority of the Comptroller and the Treasurer as to the price which may be paid in the purchase of the securities referred to. The City Comptroller and the City Treasurer, under the law, have the right to purchase such securities at a premium if in their judgment it is for the best interest of the City. They are bound only to exercise their best business judgment as to price so as to afford the City a better return on money held in the City treasury than can be secured by allowing such money to remain on deposit in authorized depositories. There is, however, a provision in the Code (section 100) which limits the authority of the City Comptroller and City Treasurer in the purchase of municipal securities of the city of Chicago at a price not to exceed the par value of same and accrued interest thereon, and there is another provision in the Code (section 104) which permits the City Comptroller and City Treasurer to sell any securities when necessary to provide sufficient money for immediate needs at not less than the par value thereof and accrued interest thereon unless otherwise authorized by the City Council.

* * * * *

INVESTMENT OF CITY FUNDS

(No. 9567—Vice-Chairman, Committee on Finance—C.P.H.—
July 20, 1937—2½ pp.)

The City Council has power to pass an ordinance granting authority to the Comptroller and the Treasurer to use the money in any of its funds or the aggregate of its funds to purchase bonds and other interest bearing obligations of the United States or of the state of Illinois.

Citations:

Statute: ISBS '35, 24: 1001.

Ordinances: Code '31: 98, 101, 102.

Other references: 18 Op. Corp. Coun. 740.

OPINION OF FOREGOING SYNOPSIS

At a recent meeting of a sub-committee of the Committee on Finance you requested an opinion from this department as to the power of the City to invest any of its funds, or money in the aggregate of funds in bonds and other interest bearing obligations.

You are advised that the Illinois State Bar Statutes, 1935, chapter 24, paragraph 1001, provides:

"That every * * * city, * * * now or hereafter holding in its treasury any fund set aside for use for some particular purpose, that is not immediately necessary for such purpose, may by ordinance of the city council of such city, * * * use the money in such fund, or in the aggregate of such funds, if there be more than one, in the purchase of tax anticipation warrants issued by said * * * city, * * * and the city council of any city, * * * may by ordinance use the money in such fund, or in the aggregate of such funds, if there be more than one, in the purchase of municipal bonds issued by said * * * city * * * or bonds and other interest bearing obligations of the United States or of the State of Illinois. * * *."

Pursuant to the foregoing statutory authority the City Council has provided by ordinance that the Comptroller and Treasurer shall have authority to purchase municipal bonds of the city of Chicago and tax anticipation warrants. (Revised Chicago Code, 1931, sections 98, 101, and 102.)

The statute provides that the City may, by ordinance, use the money in any of its funds or in the aggregate of such funds in the purchase of tax anticipation warrants, municipal bonds of the city of Chicago, and bonds and other interest bearing obligations of the United States or of the state of Illinois.

In view of the above, we are of the opinion that the City Council has power to pass an ordinance granting authority to the Comptroller and Treasurer to use the money in any of its funds or the aggregate of such funds to purchase bonds and other interest bearing obligations of the United States or of the state of Illinois to the same extent as such funds may be invested in tax anticipation warrants, pursuant to the sections of the code referred to above. (Volume 18, *Opinions of the Corporation Counsel and Assistants*, page 740.)

* * * * *

BORROWING IDLE FUNDS TO PAY IMMEDIATE OBLIGATIONS

(No. 9263—Comptroller—J.F.G.—August 14, 1936—2 pp.)

The City's fiscal officers, for the purpose of paying certain obligations which must be discharged immediately, may make loans from idle funds in the treasury, which funds are not immediately necessary for the payment of the obligations for which they have been appropriated, provided that:

(1) the funds borrowed will be reimbursed out of that proportion of the revenue collected which is applicable to the payment of the particular debt, appropriation, or liability for which the loan was made; and provided that

(2) it is reasonably certain that the funds from which the loans are made will be reimbursed before they are required to be used for payment of the obligations against them.

Citation: *Gates v. Sweitzer*, 347 Ill 353 (1932).

INVESTMENT OF PUBLIC FUNDS IN HOUSING AUTHORITY BONDS

(No. 9700—*Chairman, Chicago Housing Authority—A.F.G.—November 10, 1937—2 pp.*)

Any city, village, incorporated town, county, municipal corporation, commission, district, authority, or other subdivision or public body of the State may invest its funds in bonds of a housing authority located wholly or partly within the area of the subdivision or public body, but the funds of the State may not be invested in such bonds.

Citation: IRS '37, 24: 666; 67½: 30(c), 32.

INVESTMENT OF CERTAIN TRUST FUNDS

(No. 9504—*City Comptroller—J.F.G.—April 27, 1937—6 pp.*)

The Mayor, the City Comptroller, and the City Treasurer are trustees of the Harrison-Tree fund for meritorious service in the Police and Fire departments, and they, or a majority of them, are authorized to invest the fund in accordance with their best judgment.

There is no limitation upon the character of securities in which the J. Lloyd Armstrong fund for destitute girls is to be invested, and the City Comptroller may cause the fund to be invested in such securities as, in his best judgment, will conserve the principal of the fund.

The Jonathan Burr fund for certain school purposes is limited to investment in bonds of the United States, the city of Chicago, the county of Cook, and the state of Illinois, or in notes or bonds of individuals secured by mortgage or trust deed or unencumbered, first-class, improved and productive real estate situated in the city of Chicago. The fund may not be invested in securities issued by the Sanitary District and the Chicago Park District.

The Commissioner of Police and the City Comptroller are now *ex officio* the trustees of the Police Life and Health Insurance fund, and they may use their discretion as to the nature of the securities in which it shall be invested.

Citations:

Statute: Special Charter of Chicago (1863), ch. 10, sec. 10, 11.

Ordinances: Coun. J. (Nov. 9, 1885), p. 250.

Coun. J. (1918-19), p. 1272.

Cases: Sheridan v. Colvin, 78 Ill 237 (1875).

People v. Hummel, 215 Ill 71 (1905).

Other references: Coun. J. (Sept. 14, 1885), p. 134 (Letter from Lambert Tree to Hon. Carter H. Harrison).

Will of Ada J. Biggs, deceased.

Will of Jonathan Burr, probated in Cook County, February 25, 1869.

OPINION OF FOREGOING SYNOPSIS

We have your letter of January 13, 1937, asking our opinion as to whether or not the practice of the City Comptroller in the investment of certain trust funds in government securities is authorized.

The trust funds involved are: Harrison Tree fund, \$1,200; J. Lloyd Armstrong fund, \$9,500; Jonathan Burr fund, \$33,000; and Police Life and Health Insurance fund, \$6,200.

* * * * *

The Harrison-Tree fund was created by letter dated September 1, 1885, from Lambert Tree addressed to the Honorable Carter H. Harrison, Mayor of Chicago, which appears in the Council Journal of September 14, 1885, at page 134. By an ordinance passed November 9, 1885, appearing in the Council Journal of that date at page 250, the City Council imposed upon the Superintendent of Police and the Fire Marshal, respectively, the duty of keeping a record to be known as the "Merit Roll" in accordance with the request of Lambert Tree, and thereby accepted the trust created for the purpose of conferring upon members of the Police and Fire departments medals for distinguished acts of bravery in the protection of life and property. By the instruments referred to, the Mayor, the Comptroller, and

the Treasurer of the City are nominated as trustees of the fund. There is no provision or limitation as to the character of securities for the investment of the fund and the City officials named who are *ex officio* trustees, or a majority them, under the letter creating the trust are authorized to invest the so-called Harrison-Tree fund in accordance with their best judgment.

The J. Lloyd Armstrong fund consists of a bequest of \$10,000 by the will of Ada J. Biggs, deceased, which was accepted by the City on December 16, 1918 (*Coun. J.*, 1272-3). Under the terms of said will the bequest is to be placed "at an interest bearing income, which shall be used as the benefit, care and support of destitute, orphan and homeless girls, between the ages of five and fourteen years of age; no part of said principal, interest or income shall be used for the erection, building or maintaining of any building." By virtue of section 2 of the ordinance accepting the bequest it is provided that said sum of \$10,000 shall be placed in a separate fund in the City treasury subject to the order of the City Comptroller who shall cause same to be so handled that it will bear interest and who shall expend from the income so received such amounts only as may be asked from time to time for the purposes for which said trust was created by either the judge presiding in the branch of the Municipal Court of Chicago generally known as the Morals Court, or the judge presiding in the branch of said court generally known as the Court of Domestic Relations, the requests of either of such judges to be approved by the Chief Justice of said court. There is no limitation upon the character of securities in which said fund is to be invested, and the City Comptroller may cause same to be invested in such securities as in his best judgment will conserve the principal of the trust.

* * * * *

The Jonathan Burr fund was established under the will of Jonathan Burr admitted to probate in the Probate court of Cook County February 25, 1869. By that will a portion of the estate of Jonathan Burr was bequeathed to the city of Chicago in trust "to hold, invest, manage and control the same, and the same from time to time, to re-invest, and the annual income thereof to pay over to the Board of Education of said city" to be expended in procuring books of reference, maps, charts, illustrative apparatus, and works of taste and art at the discretion of said Board. By the twenty-ninth clause of said will it is provided that all moneys and funds "bequeathed to the several societies, corporations and institutions located in the city of Chicago, be, by the respective recipient thereof, invested and kept invested, if the same shall be practicable, in one or more of the following named classes of securities, that is to say, in bonds of the United States, of the city of Chicago, of the county of Cook, of the state of Illinois, or in notes or bonds of individuals, secured by mortgage or trust deed on unencumbered, first class, improved and productive real estate situated in the city of Chicago." The foregoing provision in the will is a limitation upon the character of the securities in which the fund is to be invested. Securities issued by the Sanitary District and Chicago Park District are not available for investment of this trust fund.

The Police Life and Health Insurance fund was established by a provision in the Act of February 13, 1863, chapter 10, section 10, which is a

part of the special charter of Chicago. The fund arose from rewards, fees, proceeds of gifts and emoluments paid and given for or on account of extraordinary services of any member of the police force, and all moneys arising from the sale of unclaimed goods which were paid into the City treasury which it was provided shall constitute a fund to be called the Police Life and Health Insurance fund. By section 11 of the same act it was provided that whenever any member of the police force, in actual performance of his duty and in consequence of the performance of such duty, shall become bodily disabled his necessary expenses during the time his disability as aforesaid continues may become a charge upon the fund provided for in the preceding section (Police Life and Health Insurance fund) at the discretion of said Board of Police. The Board shall inquire into the circumstances and, if satisfied the charge upon the said fund is correct, may order the same to be paid by the draft of the said trustees upon said fund, each writing his signature thereto. The Police Life and Health Insurance fund apparently was created as a disability insurance fund to be administered by the Board of Police Commissioners and the City Comptroller. Since the adoption by the city of Chicago of the Cities and Villages act the Board of Police was abolished as an executive department of the municipal government of the City and the Department of Police was established with one Superintendent or Commissioner of Police as the head of said department. The Commissioner of Police is undoubtedly the successor to the Board of Police in the control of the police force of the City and in the exercise of authority over the police organization, government, appointment, and discipline within the City (*Sheridan v. Colvin*, 78 Ill 237). Nevertheless, the trust fund and the trust imposed by section 10 of the act of 1863 was not terminated by adoption of the Cities and Villages act. The provisions in the special charter in respect of this fund continue in force (*People v. Hummel*, 215 Ill 71). Since it was contemplated that the executive head of the Police department and the Comptroller shall be the trustees of said fund to invest the same as they shall see fit, we are of the opinion that the Commissioner of Police and the City Comptroller are now *ex officio* the trustees of said fund and they may use their discretion as to the nature of the securities in which said fund shall be invested.

INTEREST ON CITY AND SCHOOL FUND DEPOSITS BY FEDERAL RESERVE BANKS

(No. 9358—City Comptroller—J.F.G.—December 8, 1936—
3½ pp.)

Daily balances of City funds and City school funds, including special funds and school funds which are deposited and allowed to remain without diminution for periods of at least thirty, sixty, or ninety days, subject to withdrawal at any time

without notice, are deposits which are payable on demand, and come within the definition of demand deposits of public funds made by, or on behalf of a school district or a municipality on which members of a Federal Reserve bank are prohibited from paying any interest after August 23, 1937.

Citations:

Statute: USCA, title 12, sec. 371a, 371b.

Other reference: Regulations of Board of Governors of Federal Reserve System, Regulation Q.

ADVERTISING FOR BIDS ON TIME DEPOSITS

(No. 9694 — City Comptroller — J.F.G. — November 5, 1937 — 3½ pp.)

As the City Comptroller is authorized by law to advertise for bids for interest on City money for deposit in banks, he may advertise for bids on time deposits which may not be withdrawn by check or otherwise prior to the date of maturity, thereby according with the rules and regulations of the Board of Governors of the Federal Reserve system made under the present Federal law which prohibits members of Federal Reserve banks from paying interest on any deposit which is payable on demand.

Citations:

Statute: Cities and Villages act, art. XII, pt. 2, sec. 5.

Cases: McCormick v. Hopkins, 287 Ill 66 (1919).

National Surety Co. v. McCormick, 268 Fed 189 (1920).

Louisville Trust Co. v. Commissioners of Sinking Fund, 260 Ky 219 (1935).

Other references: Op. Corp. Coun. (1913-14), p. 755; (1914-15), p. 130.

OPINION OF FOREGOING SYNOPSIS

In our letter to you of October 28, 1937, we suggested certain changes in the form of advertisement for proposal for payment of interest and the form of proposal therefore made pursuant to section 5 of part two of article XII the Cities and Villages act which requires the Comptroller to advertise for bids for interest upon the money of the City to be deposited in banks. The changes suggested were the elimination of the provision that time deposits shall be subject to withdrawal at any time without notice and that the fiscal officers of the City be authorized to enter into a written

contract with respect to such deposits so that they may not be withdrawn by check or otherwise prior to the date of maturity as provided by the rules and regulations of the Board of Governors of the Federal Reserve system adopted in accordance with the present Federal law prohibiting members of Federal Reserve banks to pay interest on any deposit which is payable on demand.

You directed our attention to opinions rendered by this department on March 18, 1914 (*Op. Corp. Coun.*, 1913-14, p. 755) and November 17, 1914 (*Op. Corp. Coun.*, 1914-15, p. 130) indicating that the City lacks the power to make time deposits accompanied by agreements that they shall not be withdrawn before maturity. Cases are cited in these opinions indicating that such time deposits are loans and that the City authorities lack the power to loan City funds except by way of investment in certain securities. The cases cited in the opinions of this department referred to were from Kansas, Minnesota, and Nebraska.

The Kansas case seems to be the closest in points of fact to the question under consideration but in that case the time deposit was for a period of three years. While this department had reason to conclude that the time involved was not the determining factor and that any time deposit, upon the authority of the Kansas case, might be considered a loan we call your attention to the fact that since these opinions were rendered by this department the Supreme Court of this State, in a case decided February 20, 1919, held that a time deposit in a bank is not a loan (*McCormick v. Hopkins*, 287 Ill 66).

In the case cited the Treasurer of the Sanitary District of Chicago had deposited \$50,000 on June 11, 1914, payable on the third day of September, 1914, with interest from June 3, 1914. The bank closed on June 12, 1914, and suit was instituted upon the surety bond of the Illinois Surety company covering deposits of the District's funds. The surety company defended the suit on the ground that the time certificate of deposit involved was a loan and not a deposit of funds. The court said (pp. 70-72):

"The questions to be decided are whether the certificate of the bank of June 11, 1914, evidences a deposit of funds then made, and if so, whether it is within the condition of the bond.

"The certificate is called, on its face, a time certificate of deposit. It is in the usual form in which such certificates of deposit are issued by banks. It is not subject to check, is payable at a future time and bears interest. But these circumstances do not, of themselves, change the character of the transaction from a deposit to a loan. * * * An ordinary deposit in the usual course of business, while it creates the relation of debtor and creditor, is not a loan to the bank (*Officer v. Officer*, 120 Iowa, 389; *Hunt v. Hopley*, id. 695). The word 'deposit,' according to its commonly accepted and generally understood meaning among bankers and by the public, includes not only deposits payable on demand and subject to check, but deposits not subject to check, for which certificates, whether interest-bearing or not, may be issued, payable on demand or on certain notice or at a fixed future time."

Since the statute relating to the city of Chicago not only authorizes but requires the City Comptroller to advertise for bids for interest on monies of the City to be deposited in banks, ample express authority is given by the ruling of our Supreme Court to advertise for bids for time deposits. The decision of the Supreme Court of Illinois referred to has never been modified or repudiated and has been cited with approval in the Federal courts and in Kentucky. (*National Surety Co. v. McCormick*, 268 Fed 189; *Louisville Trust Co. v. Commissioners of Sinking Fund*, 260 Ky 219.)

RATE OF INTEREST ON TAX ANTICIPATION WARRANTS IN 1936

(No. 9247—City Comptroller—J.F.G.—July 27, 1936—2½ pp.)

By ordinance, the established rate of interest on deposits of City monies during the year 1936 is to be applied to the interest rates on tax anticipation warrants during the fiscal year 1936, notwithstanding that any such warrants were originally issued purporting to bear interest at another rate.

Ordinances are generally prospective in their effect but they may be retrospective if it is clearly intended that they should be so.

Citations: Coun. J. (1935-36), p. 1344.
Coun. J. (1936-37), p. 1775.

VAULTS FOR CITY FUNDS

(No. 9410—Chairman, Committee on Finance—J.F.G.—January 27, 1937—1½ pp.)

The City has power to appropriate and expend money for the construction or leasing of vaults to keep safe the City's money and securities.

If vaults are used for the safe-keeping of the City's money, those vaults would be under the exclusive control of the City Treasurer, who is liable for any loss of City funds, unless deposited in a bank or other depository named by the City Council.

Citation: Cities and Villages act, art. V, sec. 2.

BONDS TO PROVIDE FUNDS FOR AIRPORTS

(No. 9342—Commissioner of Public Works—F.V.M.—November 23, 1936—2 pp.)

Bonds may be issued by the City for the purpose of providing funds to acquire, operate, or maintain airports. The statute that attempts to withdraw the power of the City to maintain landing fields is unconstitutional because it is included in the wrong act.

Citations: SH '35, 24: 65.4, 642-I.

SH '33, 24: 65.99.

Ill. Laws (3rd sp. sess., 1933-34), p. 120.

OPINION OF FOREGOING SYNOPSIS

In response to your verbal inquiry as to whether or not bonds may be issued by the City of Chicago for the purpose of providing funds to acquire, operate, or maintain airports, I quote the following:

"65.99 *Landing Fields for Aircraft*. Sec. 100. To acquire or lease real estate either within or without the corporate limits of said city or village for the purpose of establishing landing fields for aircraft." [Smith-Hurd, *Illinois Revised Statutes* (1933), ch. 24, p. 347.]

"An Act to authorize cities, villages and incorporated towns having a population of less than 500,000 inhabitants, to acquire, own, construct, manage, control, maintain and operate airports and landing fields within or without the corporate limits of such city, village or incorporated town, to levy taxes and issue bonds therefor and authorizing the power of eminent domain. * * *" (Approved March 28, 1934, Ill. Laws, 1933-34, Third Sp. Sess., p. 120).

"642-I *Repeal*. (Sec. 12.) Section 100 of 'An Act to provide for the incorporation of cities and villages' approved April 10, 1872, as amended,' is repealed." [Smith-Hurd, *Illinois Revised Statutes* (1935), ch. 24, p. 509.]

Notwithstanding the language of the foregoing section we are of the opinion that said section was improperly included in the act above quoted and is thereby unconstitutional. Therefore, we are further of the opinion that section 100 is still in effect and that being the case the City would have the right to issue bonds in connection with the acquisition, operation and maintenance of airports by reason of the power granted it by the Cities and Villages act in the following language:

"65.4 *Borrowing money. Limited indebtedness*.) Sec. 5. To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form, and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any

purpose to an amount, including existing indebtedness, in the aggregate to exceed five (5) per centum, on the value of the taxable property therein, to be ascertained by the last assessment for the State and County taxes previous to the incurring of such indebtedness; and before, or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same." [Smith-Hurd, *Illinois Revised Statutes* (1935), ch. 24, p. 364.]

RESTORATION OF BANK ACCOUNT OF ABOLISHED OFFICE TO GENERAL CORPORATE FUND

(No. 9506—*City Comptroller—J.F.G.—April 28, 1937—1½ pp.*)

A deposit and checking account of the City entitled "City of Chicago, Business Agent—Petty Cash" should be restored to the general corporate fund in the custody of the City Treasurer subject to withdrawal by warrants as in the case of all City funds, for the office of Business Agent has been abolished.

Citations: Code '31: 506-519.
Coun. J. (1931-32), p. 1564.

PAYMENT OF VOUCHER EXCEEDING FIVE HUNDRED DOLLARS

(No. 9465—*City Comptroller—R.N.—March 29, 1937—1½ pp.*)

Specific Council authority by a two-thirds vote of all the aldermen elected is needed to pay a voucher exceeding five hundred dollars in payment of work for which no formal contract was made.

Citation: Coun. J. (1936-37), p. 2673.

COMPROMISE OF BANK CLAIM

(No. 9317—*Chairman, Committee on Finance—J.F.G.—October 20, 1936—1½ pp.*)

The City cannot cancel or compromise its claims against certain banks simply for the purpose of allowing other depositors

to be paid a portion of their claims which are subject to the prior claim of the City. The City can release or compromise a debt only when such a course of action will aid public or corporate purposes.

ENDORSEMENT OF A CHECK PAYABLE JOINTLY TO THE CITY AND A PRIVATE COMPANY

(No. 9446—Commissioner of Public Works—R.D.K.—March 5, 1937—1½ pp.)

When a check has been drawn to the joint order of a private company and the City, but the City has no claim against the maker of the check, the maker should draw a new check making the private company the sole payee. The City cannot endorse the check over to the private company because no fiscal agent of the City is authorized to endorse any check of which the proceeds are not intended for the City treasury.

C. JUDGMENTS

ORDER OF PAYMENT OF JUDGMENT FOR COSTS

(No. 9318—City Comptroller—Q.O.—October 22, 1936—1½ pp.)

A money judgment for costs rendered before January 1, 1935, is payable out of the judgment tax fund and must be paid in the order in which it was entered.

Citation: ISBS '35, 24: 1032.

PRIORITY OF PUBLIC BENEFIT JUDGMENTS OVER OTHER JUDGMENTS

(No. 9048—City Comptroller—February 11, 1936—J.F.G.—2½ pp.)

Public benefit judgments are enforceable against the City as any other judgments, and there is no reason why such judg-

ments, which are payable from the judgment tax fund, should be preferred for payment over any other judgment.

A writ of mandamus issued against the City to pay any particular judgment is a writ corresponding to a writ of execution issued for the satisfaction of a judgment against a private person or private corporation, and consequently payment of any judgment out of order of entry may be made only in obedience to a writ of mandamus.

Citations:

Statutes: SH '33, 24: 697a.

Ill. Laws, 1935, p. 545.

Case: People ex rel. Farwell v. Kelly, 361 Ill 54 (1935).

OPINION OF FOREGOING SYNOPSIS

Reference is made to your letter of January 28, 1936, in which you ask to be advised if the amount assessed against the City for public benefits under the Local Improvement act payable from the judgment tax fund may be paid before judgments rendered in actions that do not involve the taking or damaging of private property for public use.

Prior to July 1, 1935, the Judgment Tax act provided that no part of said tax shall be used for the payment of any amount assessed against the City for public benefits in any proceeding under the Local Improvement act. (Smith-Hurd, 1933, chap. 24, sec. 697a.) By an act approved June 28, 1935, (Ill. Laws, 1935, p. 545) the Judgment Tax act was amended in several respects, including the elimination of the proviso that no part of said tax shall be used for the payment of public benefits. This act specifically provides, however, that judgments against the City shall be paid out of said fund in the order in which the same were obtained.

In the case of *People ex rel. Farwell v. Kelly*, 361 Ill 54, the court ordered a writ of mandamus to compel the payment of a judgment rendered in an action involving the damaging of real property incident to the changing of a grade of a street in such a way as to obstruct ingress or egress to or from said property. The court said:

"We find it unnecessary to discuss any possible effect of the amendment to the Judgment Tax act or any provisions of the ordinances of the city of Chicago concerning the order of payment of judgments. No question of priority is involved. There is admittedly more money in the judgment fund of the city than is required to pay the claim involved and there is no evidence of any other judgment creditor making claim on that fund. * * * The provisions of section 13 of article 2 of the constitution are self-executing, neither requiring any legislation for their enforcement nor susceptible of impairment by legislation or ordinance."

Unfortunately the Supreme Court in the *Farwell* case, *supra*, did not pass upon the question of priority of any class of judgments. In the

absence of any direction by a court the duty of the City Treasurer and the City Comptroller is to follow the plain language of the Judgment Tax act which provides that judgments against the City shall be paid out of the judgment tax fund in the order in which same were obtained.

As we read the decision of the Supreme Court in the *Farwell* case its effect is simply this: That a writ of mandamus issued against the City to pay any particular judgment is a writ corresponding to a writ of execution issued for the satisfaction of a judgment against a private person or private corporation and consequently payment of any judgment out of order of entry may be made only in obedience to a writ of mandamus.

Public benefit judgments are enforceable against the City as any other judgments and there is no reason why such judgments should be preferred for payment over any other judgment.

PAYMENT OF SPECIAL ASSESSMENT JUDGMENT FROM JUDGMENT BOND FUND

(No. 9493—A.A.S.—April 16, 1937—21½ pp.)

Since the obligation of the City to pay special assessments levied by the Village of North Riverside against the so-called Gage Farm owned by the City is fixed by the judgment of confirmation in the special assessment proceeding, and since the payment of that judgment can be enforced against the City in the same manner as the payment of other judgments, the special assessment judgment takes the aspect of a personal judgment against the City, and resort could be had to the judgment bond fund to pay the special assessments.

Citations:

McLean County v. City of Bloomington, 106 Ill 209 (1883).

Commissioners of Highways v. Drainage District, 207 Ill 17 (1904).

ATTORNEY'S LIEN FILED AGAINST ASSIGNED JUDGMENT

(No. 9408—City Comptroller—J.F.G.—January 27, 1937—1½ pp.)

If any judgment against the City remains unpaid, the attorney of record may file a lien against that judgment, and it is

the duty of the City Comptroller to withhold the amount claimed by the attorney as his lien even though notice of the lien was filed after notice that the judgment was assigned.

A judgment is assignable, but the assignee secures only the rights of the judgment creditor which may be subject to an attorney's lien.

Citation: ISBS '35, 13: 13.

OPINION OF FOREGOING SYNOPSIS

We have your letter of January 12, 1937, requesting an opinion as to the effect of attorneys' liens on judgments, notice of which have been filed with the City Comptroller.

A judgment is assignable but the assignee secures only the rights of the judgment creditor which may be subject to an attorney's lien.

The act creating attorney's lien and for enforcement of same (Illinois State Bar Statutes, 1935, chap. 13, sec. 13) provides that attorneys at law shall have a lien upon all claims, demands, and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection for the amount of any fee which may have been agreed upon or, in the absence of such an agreement, for a reasonable fee for the services of such attorneys rendered on account thereof, provided such attorneys shall serve notice in writing claiming such lien, and such lien shall attach to any judgment entered and to any money which may be recovered on account of such suits, claims, demands, or causes of action from and after the time of service of the aforesaid notice.

So long as any judgment against the City remains unpaid the attorney of record may file notice of lien against such judgment and it is your duty to withhold the amount of money claimed by the attorney as and for his lien, even though the notice of lien was filed after notice of the assignment of the judgment.

CHAPTER XI

CITY PROPERTY

A. REAL ESTATE

CONVEYANCE OF EXCESS LAND CONDEMNED FOR STREET TO ABUTTING PROPERTY OWNER

(No. 9359—City Comptroller—J.J.S.—December 8, 1936—3 pp.)

If a conveyance of City property is to be made to any other municipality or to the United States, it can be done without bids, but if the City desires to sell real property no longer necessary or useful to it, it must advertise for and receive bids.

If land condemned in excess of the City's needs is now a part of a public highway, and it is proposed to convey that excess land to the abutting property owner, the City should vacate the land, and make the vacating ordinance dependent upon the payment of the value of the land and the delivery of the proper deeds.

Citations: SH '35, 30: 157; 24: 422a, 512, 513.

OPINION OF FOREGOING SYNOPSIS

You submit to the Corporation Counsel a plat showing property acquired by the City for the opening of Ogden avenue between Dix street and the north branch of the Chicago river.

In your letter the following facts are set out. The City took, in the Ogden avenue condemnation, all of lot 13 and the northwesterly six feet of lot 12. This gave the City 56 feet, when all it needed was 41 feet. The error of taking the additional fifteen feet for the improvement was caused by the fact that the City maps and other atlases show lot 13 to be 35 feet wide. On a recheck the City found that lot 13 is fifty feet wide instead of 35 feet. The City paid on a square foot basis for a strip 41 feet wide and paid nothing for the extra fifteen feet. The owner reconstructed his building on the line designated by the City engineer, who did not know that the City had acquired any excess ground. The building

now stands fifteen feet on a City street, on land that is of no use to the City for street purposes. Had the City, at the time of filing its petition to condemn, known that lot 13 was fifty feet wide instead of 35 feet it would have taken 41 feet of lot 13 instead of all of lot 13 and six feet of lot 12. You recommended that the City now quit claim to * * * the present owners that portion of the excess fifteen foot strip occupied by their building (for the payment of) the sum of \$1,200 to the City, quit claiming the remainder of the fifteen foot strip to the City, and securing a release from the Reconstruction Finance Corporation of a mortgage on the fifteen foot strip.

* * * * *

You desire to be advised as to whether or not the City can convey the 15 foot strip upon authority of the City Council and without advertising for bids.

If a conveyance of City property is to be made to any other municipality or to the United States, it can be done without bids. (Smith-Hurd, 1935, page 787, sec. 157; and page 445, sec. 422a). If the City, however, desires to sell real property no longer necessary or useful to the City, it must advertise for and receive bids (Smith-Hurd, 1935, sec. 512, 513, page 473). It is doubtful if the purchaser would receive a good title if the fifteen feet of Ogden avenue was sold without bids. If the purchaser is willing to take title on a quit claim from the City, there is no reason why the City could not quit claim.

The land proposed to be conveyed is in Ogden avenue, a public highway, The proper method to give the title to the abutting owner would be to vacate that portion of Ogden avenue occupied by its building. The vacating ordinance can be made dependent upon the payment of the \$1,200 and the delivery of the deeds referred to in your submitted ordinance.

* * * * *

POWER TO CONSTRUCT MUNICIPAL AIRPORT

(No. 9454—Commissioner of Public Works—F.V.M.—March 12, 1937—1 p.)

The City has authority to construct a municipal airport at 63rd street and Cicero avenue on the school section site.

Citation: Opinion No. 9342 (this volume, p. 358).

TERMINATION OF LEASE TO EDISON PARK

(No. 9536—City Comptroller—O.W.H.—June 5, 1937—1½ pp.)

The City may terminate a lease of property to the Commissioners of the Edison Park district, to which the Chicago Park district is the successor, as there has been no substantial, permanent improvement made upon the property, and as the ordinance granting the lease indicates clearly that it was not intended that the consent to the use of the property was other than a use at sufferance on the part of the Park district.

Citation: Coun. J. (1919-20), p. 266.

DEDICATION OR LEASE OF PUBLIC SQUARE

(No. 9695—Alderman, 42nd Ward—J.L.C.—November 5, 1937—2½ pp.)

The City has no power to dedicate or lease a portion of Washington Square to the American Legion for a memorial or clubhouse as the land constituting Washington Square was donated to the City for use only as a public square.

Citations:

Cases: Robbins v. Commissioners of Lincoln Park, 332 Ill 571 (1929).
Hutchinson v. Ulrich, 145 Ill 336 (1893).

Other reference: 7 Ruling Case Law 1114.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 6, 1937, asking whether the City may dedicate or lease a portion of Washington Square to the American Legion for a memorial or clubhouse in the circumstances stated.

1. The land in question was donated to the city of Chicago "for use as a public square." While a public square is somewhat different from a public park in that a public square is generally for the purpose of keeping open spaces between intersections of streets, nevertheless they have this in common, that the open space must be preserved for the use of the public, and that it may also be used for purposes of recreation, ornament, etc.; and so, we construe the words public square for the purposes of your question to be synonymous with public park.

2. A park has been defined by the Illinois courts to be a piece of ground for ornament or to afford the benefits of air, exercise, amusement, and

recreation to the public, (*Robbins v. The Commissioners of Lincoln Park*, 332 Ill 571) and, of course, would include their safety and comfort and purposes for the general improvement of the minds and bodies of the public.

3. The restrictive language "for use as a public square" must be liberally construed so as to preserve the grant of land and the free use of the property. (7 RCL 1114). As the uses to which real estate may be devoted are constantly changing as new necessities develop, restrictions as to the use of property by a grantee should be resolved in favor of the free use of property and against restrictions. (*Hutchinson v. Ulrich*, 145 Ill 336.) We are familiar with the Montgomery Ward-Grant Park decisions, but these are based upon a grant which expressly excluded the erection of any building and therefore are not pertinent here.

Giving to the grant the aspect most favorable to the plan, we are unable to find any decision of the Supreme Court of Illinois which would definitely authorize you to pursue your proposed plan. We have read with interest your letter of October 6, and the attached communication from the American Legion, and have been so much in sympathy with the American Legion's suggestions that we have searched exhaustively for a decision to support the plan, and the duration of this search has delayed our answer.

We regret to advise you that in the absence of a decision of the Supreme Court of Illinois warranting the proposed plan, we have no alternative but to state that the same would not be lawful.

DONATION OF WATER FUND PROPERTY FOR ARMORY

(No. 9641—Mayor—J.F.G.—October 16, 1937—6½ pp.)

Although the General Assembly by a recent enactment has generally authorized cities and villages to donate lands to the State or any of its agencies to be used as a site for an armory for the National Guard, there is doubt as to whether that general power is sufficient to authorize a donation of land belonging to the water fund of the City.

Property may not be donated by cities and villages for other than their corporate purposes, and support of the National Guard is not a corporate purpose, the National Guard being exclusively a State organization. Further, the special charter of the City of Chicago of 1863 forbids the use or appropriation of the water fund for purposes other than those for which the fund was collected by the City from the consumers of water. This provision is applicable not only to money but to any property acquired by the waterworks.

- Citations: *People v. Hummel*, 215 Ill 71 (1905).
Sleight v. People, 74 Ill 47 (1874).
People v. Chicago, 351 Ill 396 (1933).
Chicago v. Cement Co., 178 Ill 372 (1899).
Trustees v. Lincoln Park Commissioners, 282 Ill 348 (1918).
People v. Williamson County, 286 Ill 44 (1919).
St. Hedwig's School v. Cook County, 289 Ill 432 (1920).
Livingston County v. Weider, 64 Ill 427 (1872).
Commonwealth v. Sparks, 255 SW 859 (1923).
Pierce County v. Clausen, 163 Pac 744 (1917).
Wasson v. Wayne County Commissioners, 32 NE 472 (1892).
Hubbard v. Fitzsimmons, 49 NE 477 (1898).

OPINION OF FOREGOING SYNOPSIS

We have carefully considered the letter of General Roy D. Keehn dated September 22, 1937, relating to (the donation of land for the Black Horse Troop armory), and we are still in grave doubt as to the power of the city of Chicago to donate the land in question to the Illinois Armory Board. It is held by the City as water fund property.

At the last session of the General Assembly, cities and villages generally were authorized to donate lands to the State, or any agency thereof, to be used as a site for an armory for the National Guard.

The first question which arises is whether such general power is sufficient to authorize a donation of water fund property. In *People v. Hummel*, 215 Ill 71, our Supreme Court held that the general Cities and Villages act does not contravene the special charter of the city of Chicago of 1863 which forbids the use or appropriation of the water fund to objects and purposes other than those for which the same was collected by the City from the consumers of water. Our opinion is that this rule is applicable not only to money but to any property acquired for the waterworks.

Assuming, however, that the recent legislation authorizes a donation of any property belonging to the City, there is still an open constitutional question involving the validity of a grant of power to cities and villages to donate any property for purposes other than the corporate purposes of the City.

Under our Constitution the object of taxation by municipal corporations must not only be public, but it must be limited to its corporate purposes. This constitutional rule is applicable to expenditure of public funds and to the divestiture of public property which the City holds for its corporate purposes. If valuable property which may be used for corporate purposes, or which may be sold to provide funds for the payment of the corporate obligations of the City, is given away or devoted to purposes other than those for which the City government exists, such act on the part of the City authorities directly affects the taxpayer who must contribute to the municipality through taxation for payment of the debts and obligations of the City.

A corporate purpose within the meaning of the Constitution is such as promotes the general prosperity and welfare of the municipality which levies the tax. A tax imposed for payment of the debts of a State or county has been held invalid (*Sleight v. People*, 74 Ill 47) and a tax levied for payment of bonds issued by a county for the purpose of securing the location of a state reform school within the county has been held invalid because it is not a corporate purpose (*Livingston County v. Weider*, 64 Ill 427).

We do not mean to say that the State may not impose taxes upon municipal corporations, or the inhabitants or property thereof, or authorize the municipal corporation itself to impose taxes upon its inhabitants or property within the municipality which are not strictly local in character if the object be to obtain the performance of duties which promote the general welfare and security of the State. There are any number of cases in our Supreme Court which hold that duties may be imposed upon municipal corporations for the general welfare of the State (*People v. City of Chicago*, 351 Ill 396; *City of Chicago v. Cement Co.*, 178 Ill 372, 383) but these were cases in which the duties were to be performed by the municipality as an arm of the State. Thus it has been held that policemen and firemen employed by a municipality perform public or governmental duties and the legislature may require the municipality to levy a tax to create a pension fund without violating the Constitution (*Trustees v. Commissioners of Lincoln Park*, 282 Ill 348). A county may be required to contribute to the expense of the construction of a bridge over a stream which is the boundary line between such county and another county, if the other county requires the bridge, on the theory that such bridge is for the use and accommodation of all citizens of the State (*People v. County of Williamson*, 286 Ill 44). The General Assembly may require a county to build a courthouse or jail, to pay the expense of summoning jurors, to support paupers, and pay for the care of dependent children committed to a religious denominational school (*St. Hedwig's School v. Cook County*, 289 Ill 432). But these cases cannot be considered as authority for imposing taxes or other obligations upon municipal corporations or their inhabitants or authorizing municipal corporations to tax their inhabitants for purposes which are *exclusively* State obligations. That would be violative of the provisions of the Constitution relating to equality and uniformity of taxation throughout the State (*Livingston County v. Weider*, 64 Ill 427, 431).

The National Guard is *exclusively* a State organization. The city of Chicago cannot be compelled by State authorities to contribute to the support or maintenance of the National Guard any more than its pro rata share with the city of Peoria, with the city of Springfield, and the rest of the State. Neither can the city of Chicago compel its taxpayers to contribute more than their proportionate share of the expense of maintaining the National Guard. The National Guard is not, as suggested by General Keehn, a reserve police force to protect life and property in the city of Chicago any more than it is such a reserve police force to protect life and property throughout the State. The City authorities have no control over

the men or the property of the National Guard. They cannot call upon the National Guard to protect life and property within the City. They may call upon the Governor for troops in case of necessity, but the Governor may refuse to send troops. The location of an armory in the City is of no particular advantage to it in the administration of its corporate powers excepting as part and parcel of the entire state of Illinois. The General Assembly might as well authorize the City to maintain a State capitol or buildings and facilities for branch offices of the State.

There are no cases in Illinois directly affecting this question. We have examined authorities in other states and there is a contrariety of opinion upon the subject as to whether the maintenance of an armory is so germane to the objects of incorporation of a municipality as to permit the corporate authorities to saddle the expense thereof upon its taxpayers exclusively.

In Kentucky it was held that the State militia is essentially and exclusively a State institution with no county receiving any special benefits so as to make taxation for the support or administration thereof a "county purpose" [*Commonwealth v. Sparks*, 225 SW 859, (1923)].

In the state of Washington the Supreme Court said, in *Pierce County v. Clausen*, 163 Pac 744 (1917), that they would not hold that building an armory was exercising corporate powers for purely county purposes but nevertheless the State, acting through its legislature, is fully empowered to distribute its burden to its political subdivisions. Under this authority, if followed by our State Supreme Court, the State probably could impose a duty upon the city of Chicago, or authorize the city of Chicago to maintain an armory but if the decisions of our Supreme Court already referred to were followed our court would probably hold that the City could not be compelled or authorized to tax its people or donate its property for an armory to be maintained exclusively by State authority and under State control.

In Ohio it was held that the construction of an armory for the State militia is not a corporate function of the county (*Wasson v. Commissioners*, 32 NE 472; *Hubbard v. Fitzsimmons*, 49 NE 477).

It is impossible for anyone to foretell how our Supreme Court might decide this question. We are submitting our opinion on this matter for your guidance so that in the event that it is determined to exercise the power expressly given to donate land to the Illinois Armory Board to be used as a site for an armory for the National Guard and a suit is brought by a taxpayer, or any other person qualified to sue, to enjoin the conveyance or to invalidate the conveyance, when made, the City authorities will not be taken by surprise.

B. WATER WORKS

WATER MAIN REFUND WHEN NO WATER REVENUE

(No. 9417—*Commissioner of Public Works—M.H.F.—January 30, 1937—5½ pp.*)

The City cannot refund with interest money advanced to pay for the extension of water mains if, although the value of the water pumped through the mains is ten or more cents per lineal foot, there is no actual revenue from the mains, the water being delivered to charitable institutions which are exempted by ordinance from paying for it.

Citations:

Ordinances: Code '11: 2128.
Code '31: 4131.

Case: Babcock v. Goodrick, 47 Cal 488 (1874).

Other reference: 18 Op. Corp. Coun. 808 (No. 6748).

OPINION OF FOREGOING SYNOPSIS

Your communication of December 23, 1936, submits a copy of a letter from Mr. A— L. F—, dated June 3, 1936, requiring the refund of \$1,-986.28 advanced and paid for water mains and the above mentioned water certificate in the years 1911 and 1912, together with interest thereon at the rate of 3½% from the date said mains produced an annual revenue of 10 cents per lineal foot. You also attach a copy of a report of survey, signed by the Chief Water Assessor, showing that water to the value of \$2,407.20 annually is delivered by this system of pipes, or in other words that water to the value of 83 cents per lineal foot is delivered annually. It is stated that the advance was made to extend water mains in E. Superior Street from Fairbanks Court to Lake Shore Drive and in Fairbanks Court from Superior Street to Chicago Avenue. It is, however, explained that this entire amount of water is delivered to the Passavant Memorial Hospital, a charitable institution, and Northwestern University, an educational institution, neither one of which pays for the water delivered to it. Without revenue from these two institutions the permanent annual revenue to the water fund is zero cents per lineal foot on this certificate.

You state that while the amount of water rental is entered on the water office ledgers, the fact that it is annually decreased has brought up the question as to the legality of a refund of the full amount of this certificate, including the 3½% interest. You request our opinion as to the legality of making a refund on the certificate.

Section 2128 of the Chicago Code of 1911, in force at the date of the issuance of the certificate, reads as follows:

"2128. *Cost advanced by property owners.*) The commissioner of public works may extend water mains where owners of the property, or persons desiring such extension, shall advance and pay into the city treasury a sum of money equal to the entire cost thereof; and whenever, upon a proper survey, it is shown that a permanent annual revenue of ten cents per lineal foot is being derived from such water mains so laid, then such money so advanced as aforesaid shall be repaid to the person or persons so advancing the same; provided, however, if the money so advanced is not paid back within two years, interest at the rate of three and one-half per cent per annum shall be allowed after the expiration of said two years, until paid."

As stated in your letter and shown by the report of survey, a permanent annual revenue of 10 cents per lineal foot has not been and is not now derived from the system of pipes under consideration, though water to the value of 83 cents per lineal foot, furnished gratuitously to the Passavant Memorial Hospital and Northwestern University, passes through the pipes.

Section 4131 of the Revised Chicago Code of 1931 relating to property exempt from water rates provides in part as follows:

"4131. *Property that may be exempted from payment of water rates.*) The Commissioner of Public Works may exempt from the payment of water rates property herein enumerated as follows:

"(a) Such property as is used in the immediate conduct of carrying out of the purposes of any charitable, religious or educational institution, if application be made for such exemptions to the commissioner of public works in the form prescribed by him and if it shall appear to the satisfaction of said commissioner that such property is not used for gain or profit, or rented, conducted, operated or maintained for the purpose of producing revenue. As a prerequisite for the granting of such exemption, the commissioner of public works shall upon demand be provided with access to the financial records of such institutions.

* * * * *

"The supply to all premises enumerated in this section on which water may be taken from the waterwork system of the city of Chicago shall be controlled by meter, and the cost of installing the meter, connections, and vaults thereof, and the erection, construction and maintenance thereof shall be paid for and be borne by the institution or owner thereof.

* * * * *

"The commissioner of public works may fix such reasonable amounts of water as he may deem to be sufficient for the requirements of said

premises, and the exemption from payment of water rates shall be limited to said reasonable amounts so fixed.

"All use of water in excess of said reasonable amounts shall be paid for at the rates for metered water hereinafter fixed in Section 4112.

"Accounts against the property of any institution exempted under the provisions of this section shall be kept in the usual manner. During each year the amount of such account shall be transmitted to the chief water assessor, who shall cause an inspection of the premises, and when said assessor shall certify that said premises has been exempted under the provisions of this section from the payment of rates and charges, such amount shall be cancelled, and a record of each institution and the amount so cancelled, shall be kept in a book provided for that purpose.

"The accounts of the department of public works shall show amounts so cancelled as a credit to the total collection and as a debit to the institution specified."

"Revenue," as we interpret the meaning of that word as used in section 2128 of the Chicago Code of 1911, means money actually received rather than an estimated amount to be received or which might be received. (*Babcock v. Goodrick*, 47 Cal 488, 513).

In the year 1930 you requested our opinion with regard to a somewhat similar claim for refund of money advanced for the laying of a water pipe in West 49th place. The pipe in question had not brought in to the City any revenue from the time it was laid in 1912, and in 1923 the city of Chicago purchased all property abutting on 49th place and vacated a portion of said street, utilizing the site for a pumping station. By reason of this action the pipe in question was permanently rendered non-revenue producing. This department expressed the view that notwithstanding the fact that the water pipe would never become a source of revenue, there was no legal ground for refund. It was pointed out that the person who advances money for the laying of a water main does so under a special contract with the City, one of the terms of which is that until the City receives a permanent revenue from the main of at least ten cents per lineal foot, he is not entitled to a refund. (Opinion No. 6748, *Opinions of the Corporation Counsel and Assistants*, volume XVIII, page 808).

While Mr. F— might have some cause to complain that it would be only equitable that the Northwestern University and Passavant Memorial Hospital should reimburse him for the cost of the main which now is used for the exclusive benefit of these institutions, or pay to the City a permanent revenue sufficient to authorize the City to refund the deposit, as we view the matter, he has no legal and enforceable claim against the City for refund at this time.

* * * * *

REFUND OF DEPOSIT FOR WATER MAIN EXTENSION

(No. 9573—Alderman, 41st Ward—E.R.H.—July 27, 1937—
2½ pp.)

Money deposited with the City to obtain the extension of certain water mains, having been so deposited after the amendment of the City's ordinances on the subject, cannot be refunded until the revenue to the City from the extended mains equals the amount required by the amendment, namely, fifteen cents per lineal foot.

Citations: Code '22: 3328.
Coun. J. (1928-29), p. 4395

OPINION OF FOREGOING SYNOPSIS

In reply to your communication of July 20, 1937, requesting our opinion with reference to the deposit of A— J. S— and Company in the sum of \$3,-766.62, under date, as you stated, September 29, 1929, with the City to secure an extension of the City water mains in Rutherford avenue from Belmont avenue to Roscoe street.

If, as stated in your letter, the ordinance in force and effect at the time the deposit therein referred to was made, provided for a refund when the mains installed returned a revenue to the City of six cents per lineal foot, the City would be bound to make such refund when such revenue amounted to six cents per lineal foot or over upon proper survey.

An ordinance subsequently passed by the City authorizing a refund only when the revenue rate of fifteen cents per lineal foot is reached would have no effect on the right of the * * * * company to a refund from the City under the terms of the ordinance in force at the time their deposit was made.

However, in checking the matter with the City Clerk's office, we find that article 9, chapter 65, section 3328, providing:

"3328. *Water mains—cost advanced by property owners.*) The commissioner of public works may extend water mains where owners of the property, or persons desiring such extension, shall advance and pay into the city treasury a sum of money equal to the entire cost thereof; and thereafter whenever, upon a proper survey, it is shown that a permanent annual revenue of six cents per lineal foot is being derived from such water mains so laid, then such money so advanced as aforesaid shall be repaid to the person, or persons, or corporation so advancing the same, without interest."

was amended by the City Council in the *Journal of the Proceedings*, January 16, 1926, on page 4395, as follows:

"By striking out from the sixth line of Section 3328 the words 'six cents,' and inserting in lieu thereof the words 'fifteen cents'."

The ordinance as above amended was in force January 16, 1929, and at the time A—J. S—and Company placed on deposit with the city of Chicago the sum of \$3,766.62 on September 29, 1929, as stated in your letter.

Therefore, in our opinion A— J. S— and Company are not entitled to a refund of that deposit until the revenue to the City from the extension of the mains referred to equals fifteen cents per lineal foot.

SUSPENSE ACCOUNT PROCEDURE FOR METER RATES

(No. 9056—*Commissioner of Public Works—J.A.S.—February 18, 1936—3½ pp.*)

The Superintendent of Water should follow the same procedure in adjusting a water bill involving a change of ownership under meter rates as is applied at the present time to such a bill under assessed rates, so far as the suspense accounts are concerned.

The City has no perfected lien on real estate for unpaid water charges and liability for water charges arises only by contract, express or implied, between the consumer and the City.

Citations:

Ordinances: Code '31: 188, 189, 4129, 4130.

Case: Rockford Savings and Loan Association v. Rockford, 352 Ill 348 (1933).

OPINION OF FOREGOING SYNOPSIS

We reply to your oral request for an opinion as to the handling of suspense account items of meter charges involving a change of ownership and not of tenancy.

Section 4129 of the Revised Chicago Code of 1931 is limited in its application thus:

"4129. *Change of ownership of delinquent premises.*) Where water rates and charges *under assessed rates* appear upon the records of the bureau of water as unpaid, and * * *" (latter italics ours).

Similarly section 4130 is restrictive in its scope as is shown by its opening clause:

"4130. *Change in tenancy of delinquent premises.*) Where rates and charges for water *registered by meter* appear upon the records of the bureau of water as unpaid, and * *" (latter italics ours).

The ordinance quoted, being the only enactments outlining a definite procedure for the disposition of charges to be taken off the current ledgers upon the request of new owners or tenants, obviously do not embrace the situation at hand.

However, we shall consider sections 188 and 189 of the Revised Chicago Code of 1931 which provide:

"188. *Suspense accounts to be opened.*) The Commissioner of Public Works shall cause to be opened in the general ledger of the Bureau of Water two accounts, to be known as the suspense accounts number 1 and number 2. In suspense account number 1 shall be shown the totals of all the accounts and items which may under any section relating to frontage rates accounts, be ordered transferred; and in suspense account number 2 shall be shown the totals of all the items which may under any section relating to meter rates accounts, be ordered transferred.

"189. *Ledgers for suspense accounts.*) The Commissioner of Public Works shall provide suitable detailed ledgers, in which the detailed accounts of suspense accounts number 1 and number 2 shall be kept and shown. All accounts affected by order of court and recommendations of the corporation counsel shall come within the scope of the section."

Our interpretation of section 188 is: Suspense accounts numbers 1 and 2 are authorized; in the former are to be entered the total of all items determined by frontage rate assessment, in the latter the total of all items determined by meter rate. We note specially that this section makes no distinction between the cause of the change in either account, viz., new ownership or tenancy.

The last sentence of section 189 approves the posting of disputed accounts in either suspense ledger as the result of legal proceedings, if said entries are supported by the recommendations of the Corporation Counsel. In other words, a final decree of court may find that a new consumer who has recently acquired real estate under meter rate is entitled to a permanent injunction. The Corporation Counsel may determine that the decree is final and forward his recommendation to the Bureau of Water to the effect that the disputed amount be placed in the suspense account. Under the assumed situation section 4129 does not apply strictly. How-

ever, section 189 is to be followed, and the litigated item entered in suspense account number 2 as indicated in section 188.

At this point we repeat our past declarations to the effect that the City has no perfected lien on real estate for unpaid water charges. Such is not only supported by the Supreme Court of Illinois in *Rockford Savings and Loan Association v. City of Rockford*, 352 Ill 348, but by the foregoing sections of the Code which indicate quite definitely that liability for water charges arises only by contract, express or implied, between the consumer and the City.

It is apparent that a new owner or tenant who is in good credit standing with the Bureau of Water and who is not attempting to avoid a proper charge should not be compelled to take legal steps for the protection of established rights because, unwittingly perhaps, he has purchased realty supplied with water through a meter. The difference between the instant case and a change of ownership under assessed rates appears therefore to be one of form only.

In view of the above, we are of the opinion that the Superintendent of Water should follow the same procedure in adjusting a water bill involving a change of ownership under meter rate as is currently applied to such a bill under assessed rates as far as the suspense accounts are concerned.

LIABILITY OF TAVERNKEEPER AND LANDLORD FOR DAMAGE BY INTOXICATED PERSON

(No. 9665—*Commissioner of Public Works—A.C.—October 22, 1937—2 pp.*)

A tavernkeeper and his landlord are liable under the Illinois Liquor Control act to the City for damage to a water hydrant caused by a person who became intoxicated from liquor served to him in a tavern conducted by the tavernkeeper and rented from the landlord.

Citations:

Statute: Illinois Liquor Control act, art. VI, sec. 14.

Case: Morley v. Moulton, 45 Ill App 304 (1892).

C. TAXATION OF CITY PROPERTY AND ACTIVITIES

TAX ON GAS AND ELECTRICITY SOLD TO NAVY PIER TENANTS

(No. 9480—*Commissioner of Public Works—M.H.F.—April 7, 1937—4½ pp.*)

Because the City sells to its Navy Pier tenants and exhibitors gas and electricity for their use or consumption, the City is a taxpayer within the meaning of that term as used in the Public Utility Gross Receipts Tax act, and must make the returns and pay the tax required by the act upon the gross receipts received by it from the tenants and exhibitors at Navy Pier for gas or electricity supplied to them. However, the City need not make any return or pay any tax for the electrical current and gas purchased by the City and consumed by the City at the Navy Pier for municipal purposes.

Receipts for gas or electricity sold directly by the City to the United States government may be shown on the tax return as deductions from the gross receipts, and no tax paid upon them.

The Public Utility Gross Receipts Tax act imposes the tax upon the seller of electricity or gas, and it may not be passed on to the purchaser. However, there is nothing in the act which prohibits the City as a seller of gas or electricity from increasing the price of the gas or electricity, or from adding an additional item to its bill to repay it for the additional expense caused by the act, so long as that additional item is properly identified as a part of the selling price, and so long as no contract exists as to the rates at which gas and electricity are to be furnished.

Citations:

Statute: Ill. Laws (1937), p. 1052, (Public Utility Gross Receipts Tax act).

Case: Chicago v. Ames, 365 Ill 529 (1937).

Other reference: Department of Finance Rules and Regulations, art. 14.

OPINION OF FOREGOING SYNOPSIS

Your letter of April 6, 1937, invites our attention to an act entitled "An Act in relation to a tax upon persons engaged in the business of transmitting telegraph or telephone messages or of distributing, supplying, furnishing or selling gas or electricity for use or consumption," recently enacted by the Illinois legislature, effective March 11, 1937. You state that the city of Chicago bills tenants and users at the Navy Pier for gas and electricity consumed by them, and you request our opinion as to the proper procedure to be followed in complying with this new statute and also whether you should specify the amount of the tax as an additional item on the bills or whether the City itself will absorb the tax in the gross receipts from these sales of gas and electricity.

The act mentioned imposes a tax upon persons engaged in the business of distributing, supplying, furnishing, or selling gas or electricity to persons for use or consumption and not for resale at the rate of three per cent of the gross receipts from such business until July 1, 1938, and at the rate of two per cent thereof after June 30, 1938. It is our understanding that the city of Chicago resells to its Navy Pier tenants and special exhibitors electrical current which the City buys from the Commonwealth Edison company and gas which it buys from the Peoples Gas Light and Coke company, and that the City measures the electrical current and gas by means of meters which it installs for the purpose.

Article 14 of the Rules and Regulations of the Department of Finance of the state of Illinois, relating to the act in question, provides in part as follows:

"Persons owning, operating or leasing buildings, who purchase gas or electrical services and rebill the same as such to tenants, make the final sale or distribution of such services, and become liable for tax measured by their gross receipts from the distributing, supplying, furnishing or selling of the services in question. Such persons are required, under the terms of the Act, to file Returns and pay tax in the same manner as any other taxpayer.

"Such persons shall show receipts from such services separately upon their books and records.

"In order to enable persons selling gas or electricity to owners, operators or lessees of buildings to report accurately to the Department the amount of gas or electrical services sold for resale and the amount sold for use or consumption, such owners, operators or lessees of buildings should, at the end of each of their billing periods, report to the supplier the amount of gas or electricity (kilowatt hours, cubic feet or therms as the case may be) consumed by the owner or building operator and not resold by him as such to tenants. The owners, operators or lessees of buildings need not report to the Department the amount so reported to the supplier.

"The sale of such services to persons owning, operating or leasing buildings constitute the sale of services for the purpose of resale, if such

persons bill the same as such to tenants and the gross receipts from this particular type of sale may be deducted from receipts by which the seller measures his tax under the Act."

Inspection of the form of lease used by the City in renting Navy Pier space to tenants discloses that the City obligates its lessees to purchase from it electricity used by the lessees in their demised premises and to pay for such electricity at the same rates charged by the Commonwealth Edison company for similar service, such payments to be in addition to the rental specified in the lease. Exhibitors who engage space on the Navy Pier are, we are informed, required to assume certain fixed charges, including those for gas and electrical current supplied them by the City. Because the City sells to its Navy Pier tenants and exhibitors gas and electricity for their use or consumption, our opinion is that the City becomes a taxpayer within the meaning of that term as used in the act and is required to make the returns and pay the tax prescribed by the act upon the gross receipts or consideration received by it from such tenants and exhibitors for gas or electricity supplied them for use or consumption. The act specifically provides that cities or other political subdivisions of the State are persons subject to the tax within the meaning of that term as used in the act.

You are therefore advised that, with respect to the gross receipts derived from its business in selling gas and electricity to its Navy Pier tenants and exhibitors, the City is required to make the prescribed monthly returns and to pay the tax imposed by the act. With respect to the electrical current and the gas purchased by the City and consumed by the City on the Navy Pier for municipal purposes, of course the Commonwealth Edison company and the Peoples Gas Light and Coke company, respectively, and not the City, are the taxpayers under the act. Concerning receipts from gas or electricity services billed directly by the City to the United States government, these may be shown on the tax return as deductions from the gross receipts and no tax paid upon them.

Because of the recent decision of the Supreme Court of Illinois in the case of *City of Chicago v. Ames*, which involved the Public Utility Tax act of 1935,²⁶ our opinion is that it would be unavailing for the City to contend that it is not a person engaged in the business of selling gas and electricity for use or consumption and therefore not subject to the tax.

* * * * *

In answer to your question whether the tax as such may be included in the bills rendered by the City to its Navy Pier tenants and exhibitors, you are advised that the act in question imposes the tax upon the seller of electrical energy or gas for use or consumption, and therefore it may not be passed on to the purchaser. There is, however, nothing in the act which

²⁶ The Court held [365 Ill 529 (1937)] that the act, which imposed a tax upon persons engaged in the business of distributing, supplying, furnishing, or selling water, gas or electricity, was applicable to municipalities which sell water, gas, or electricity, as against the contentions that municipalities were not persons, made no profits, and were not engaged in business. On other grounds, the act was held invalid as applied to municipalities.

prohibits the City as a seller of gas or electricity from increasing the price of gas or electricity furnished by it or from adding an additional item to its bill to repay it for the additional expense caused by the act, so long as such additional item is properly identified as part of the selling price, and so long as no contract exists as to the rates at which electrical energy and gas are to be furnished. If the tax in question should become burdensome, we know of no reason why you would not be authorized to increase the City's selling price of gas proportionately and take steps to modify future leases so as to permit the City to charge a proportionately higher price for electricity.

TAX ON GAS SOLD TO NAVY PIER TENANTS

(No. 9541—*Commissioner of Public Works—M.H.F.—June 9, 1937—1½ pp.*)

The City is subject to pay a tax under the Public Utilities' Gross Receipts Tax act upon gas furnished to tenants and exhibitors at Navy Pier, regardless of the fact that the meters used are the property of the gas company.

Citations: Opinion No. 9480 (this volume, p. 378).
Department of Finance Rules and Regulations, art. 14.

TAX ON ELECTRICITY USED FOR SUBWAY LIGHTING

(No. 9491—*Acting Commissioner of Streets and Electricity—M.H.F.—April 15, 1937—4½ pp.*)

As the City is the user or consumer of all electricity purchased for subway lighting purposes, it is not engaged in the business of "distributing, supplying, furnishing or selling . . . electricity for use or consumption" and therefore is not subject to the Public Utility Gross Receipts tax.²⁷ Hence, the Acting Commissioner of Streets and Electricity should decline to furnish to the Commonwealth Edison company reports of electricity used to light certain railroad subways.

All electricity purchased by the City from Commonwealth Edison company for subway lighting is purchased for street

²⁷ The State Department of Finance concurred in a letter dated June 14, 1937, to the Department of Law of Chicago.

lighting purposes, a municipal undertaking. The fact, that by some collateral agreement or agreements with certain railroad companies the City receives reimbursement for its cost of lighting certain subways in consideration or part consideration of the privilege given these railroad companies to elevate their tracks, does not put these railroad companies in the position of ultimate users or consumers of the electricity or cause the City to be regarded as a reseller of electricity, and so a taxpayer under the Public Utility Gross Receipts Tax act.

Citation: Ill. Laws (1937), p. 1052 (Public Utility Gross Receipts Tax act).

OPINION OF FOREGOING SYNOPSIS

Your letter of April 2, 1937, forwards a form letter received by you from the Commonwealth Edison company addressed as "Notice to customers who purchase electrical energy for resale," together with printed forms of the state of Illinois, Department of Finance for use in reporting electricity used by that company's own customers, also that portion that is resold. You state that these forms cover lighting service in those subways which by Track Elevation ordinances, the railroad companies are required to light and where the electrical energy is not supplied by the companies from their own power plants. It is stated that in these cases the City has arranged with the Commonwealth Edison company for the energy supplied, that that company bills the City for this service at the rates established by ordinance, and that the City in turn bills the railroad companies at these same rates, plus five per cent for supervision. Having in mind that should the reports be filled out and sent to Commonwealth Edison company, the City may become liable for the payment of the State tax on sales of electrical energy, you request our advice upon the matter.

Since the receipt of your communication, we have conferred with a representative of the Bureau of Electricity and secured from him additional data. He informs us that the railroad companies whose names are stated upon the notices are obligated by Track Elevation ordinances to light the subways, also described on the notices. He also informs us that prior to the year 1925, there were in force and effect with these railroad companies so-called subway and grade crossing lighting agreements whereby the City undertook to furnish electricity for the lights in the incandescent lighting systems in said subways by purchasing the electricity for lighting from Commonwealth Edison company and billing the railroad companies therefor upon the basis of the actual cost to the City plus five per cent for cost of supervision, bills to be rendered monthly, the railroad companies to pay said bills within twenty days after presentation. These contracts, we are however informed, expired December 31, 1924, and since that date the railroad companies have declined to renew them although they have continued to pay the bills rendered them for the electricity at the above mentioned contract rates. We are also informed that there is now in force and effect a contract between the City and Commonwealth

Edison company dated December 15, 1927, whereby the company agrees to furnish to the City, and the City agrees to take from the company, electric service for the City's usage at the respective rate stated therein. Section 1 (A) covers the matter of supplying electricity for subway lighting. Under this agreement, we are told, the City procures electrical current which it uses for the lighting of those subways which it lights at its own expense, and also that current used for lighting subways, and for which it bills the railroad companies hereinbefore mentioned and receives reimbursement from these railroads.

By an act recently passed by the Illinois legislature entitled "An Act in relation to a tax upon persons engaged in the business of transmitting telegraph or telephone messages or of distributing, supplying, furnishing or selling gas or electricity for use or consumption," approved March 11, 1937, a tax is imposed upon persons engaged in the business of distributing, supplying, furnishing or selling electricity to persons for use or consumption and not for resale at the rate of three per cent of the gross receipts from such business until July 1, 1938, and at the rate of two per cent thereof after June 30, 1938. For the purpose of this act, "gross receipts" is defined to mean the consideration received for electricity supplied or furnished to persons for use or consumption and not for resale, and for all services rendered in connection therewith, including minimum service charges. "Taxpayer" means a person engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption and not for resale. The term "person" is defined to include any city or other political subdivision of this State.

The lighting of subways is part of the City's undertaking to light streets. If that portion of a street running through a subway were not lighted, the City might be subject to claims for damages or otherwise injuriously affected. All electricity purchased by the City from Commonwealth Edison company for subway lighting is purchased, therefore, for street lighting purposes, a municipal undertaking. The fact that by some collateral agreement or agreements with certain railroad companies it receives reimbursement for its cost of lighting certain subways in consideration or part consideration of the privilege given these railroad companies to elevate their tracks would not, in our opinion, put these railroad companies in the position of ultimate users or consumers of the electricity or cause the City to be regarded in the light of a reseller of electricity and hence a taxpayer under the State act. As we view the matter, the City is the user or consumer of all the electricity purchased for subway lighting purposes. Under the facts as given us it is not engaged in the business of "distributing, supplying, furnishing or selling * * * electricity for use or consumption," and therefore is not subject to the tax imposed by the act.

Our opinion is that you should decline to furnish the reports to Commonwealth Edison company and take the stand that the City is not obligated to file returns or pay the tax imposed by the act.

* * * * *

TAX ON ELECTRICITY FOR GRADE CROSSINGS AND EXTRA LIGHTING OF DEARBORN STREET

(No. 9516—*Acting Commissioner of Streets and Electricity—
M.H.F.—May 11, 1937—2½ pp.*)

The City is not subject to the tax levied by the Public Utility Gross Receipts Tax act for electricity used to light railroad grade crossings²⁸ and for additional lighting of Dearborn street between Lake and Polk streets.

The lighting of railroad grade crossings is a part of the City's undertaking to light its streets, and all electricity used for grade crossing lighting purposes is consumed by the City, whether generated by the City itself or purchased from Commonwealth Edison company. The fact that the City may bill certain railroad companies and receive reimbursement from them for a portion of its cost of lighting the grade crossings does not put the railroad companies in the position of ultimate users or consumers of the electricity, nor cause the City to be regarded as a reseller of the electricity and, hence, a taxpayer under the Public Utility Gross Receipts Tax act.

As to the additional lighting of Dearborn street between Lake and Polk streets, the City does this so long as the Dearborn Street Improvement Association reimburses it for the excess cost. The City under these circumstances is doing no more than lighting its streets, and when it bills the Dearborn Street Improvement Association for the excess lighting and receives reimbursement for that excess lighting, it is not engaged in the business of "distributing, supplying, furnishing or selling . . . electricity for use or consumption" and is not subject to the tax imposed by the Public Utility Gross Receipts Tax act.

Citations:

Ordinance: Code '31: 1150.

Other reference: Opinion No. 9491 [this volume, p. 381].

²⁸ The State Department of Finance concurred in a letter dated June 14, 1937, to the Department of Law of Chicago.

TAX ON ELECTRICITY GENERATED BY CITY'S POWER PLANT

(No. 9521—Commissioner of Public Works—M.H.F.—May 15, 1937—4 pp.)

The distribution of electricity from the City's power plant to the various departments and bureaus of the City or to the County buildings does not constitute the business of distributing, supplying, furnishing, or selling electricity so as to subject the City to the payment of the tax imposed by the Public Utility Gross Receipts Tax act.²⁹ The City, as joint operator with the County of the power plant, does not sell electricity when it merely allocates the electricity generated by the plant to the various branches of the City's government or the County.

Both the City and County occupy the position of users of electricity which they themselves produce.

Citations:

Statute: Ill. Laws (1937), p. 1052 (Public Utilities Gross Receipts tax).

Other reference: Opinion No. 9480 (this volume, p. 378).

OPINION OF FOREGOING SYNOPSIS

Your communication of April 23, 1937, states that you have problems in connection with the recent State act approved March 11, 1937, entitled "An act in relation to a tax upon persons engaged in the business of transmitting telegraph or telephone messages or of distributing, supplying, furnishing or selling gas or electricity for use or consumption," which problems are not covered by our opinion rendered April 7, 1937,³⁰ relative to the payment of a tax upon the gross receipts derived from the sale of gas and electricity to Navy Pier tenants. You state that the municipal power plant generates and distributes steam and electricity to a number of divisions in the water fund, various departments in the corporate fund, and the criminal court and jail buildings of Cook county; that the cost of operation, repairs, interest, and depreciation, less revenue from electricity, is apportioned to the various consumers on a basis of steam distributed, and electricity is billed at \$.01 per K. W. hour by meter; that both the City departments and the County are billed in accordance with the terms of a contract between the city of Chicago and Cook county. You further state that in the water fund, there are no reimbursements made for this service since an appropriation to cover the cost would really be a double appropriation for the same purpose, since the municipal power plant is paid entirely out of the water fund, and therefore, service is given free of charge to various sections of the Bureau of Engineering.

²⁹ The State Department of Finance concurred in a letter dated October 25, 1937, to the Department of Law of Chicago.

³⁰ Opinion No. 9480 (this volume, p. 378).

Referring to the electricity allocated to the various departments and bureaus of the city of Chicago and also to the electricity used by the county of Cook for the Criminal Court and jail buildings, in order that your department may be advised concerning the act in question, you request our opinion upon the following questions:

"1. Is the Municipal Power Plant subject to the state tax on electricity which became effective March 11, 1937?

"Should the Corporation Counsel rule that this application of tax is required, we request an opinion on the following:

"2. Would this tax be in effect on electricity furnished to consumers in all funds heretofore mentioned, i. e., Corporate Fund, Water Fund, and other funds which may be, or have been, established?

"3. Would the tax, having become effective March 11, 1937, become payable when the service for the month of March is billed, or when payment is received?

"4. The service being billed out at cost and in accordance with the provisions of the contracts, could the amount of tax be considered an additional item of cost and included on bill as part of the cost of operating the plant?

"5. The Act provides a 3% tax to July 1, 1938, and 2% thereafter. Would service furnished before July 1, 1938, and paid for after July 1, 1938, be subject to a 2% or a 3% tax?"

Our understanding is that the municipal power plant was erected by the City with money borrowed from the water fund and that on March 10, 1931, an agreement was entered into by and between the city of Chicago and the county of Cook pursuant to express legislative authority given by an act of the General Assembly passed at its 1925 session. Under the terms of this contract both steam and electricity are generated at the power plant for the use of both the City and the County institutions in the vicinity of the plant. We have examined a copy of the contract and find that it provides that the costs of maintaining the plant are to be paid by both the City and the County and that the money borrowed from the water fund is to be paid back by both the City and the County. This contract therefore seems to be controlling upon the question and to evidence the fact that the operation of the power plant is a joint undertaking or enterprise carried on by both the city of Chicago and the county of Cook.

Our opinion therefore is that the distribution of electricity from the municipal power plant to the various subordinate departments or bureaus of the City does not constitute the business of distributing, supplying, furnishing, or selling of electricity so as to subject the City to the payment of the tax imposed by the act. As we view the matter, the city of Chicago, one of the joint operators of the power plant, does not sell electricity when it merely allocates portions of it generated at the plant to various branches of the municipal government, even though for bookkeeping and accounting purposes there is interdepartmental billing.

Regarding that portion of the electricity generated at the power plant and allocated to the county of Cook for the Criminal Court and jail buildings, our opinion is that, because the City and the County are engaged in a joint undertaking or enterprise in the operation of the plant, the City may not be regarded as a seller of electricity to the County so as to subject the City to tax under the act in question. Both the city of Chicago and the county of Cook in our judgment occupy the position of users of the electricity which they themselves produce.

Answering your questions no. 1 and no. 2, we do not regard the municipal power plant as a taxpaying entity or as an entity separate and apart from the city of Chicago. Our opinion is that the City is not subject to the tax on any electricity generated at the power plant and allocated merely to the municipality's various activities and instrumentalities.

In view of what we have said hereinbefore it seems unnecessary to answer the remaining questions.

CITY PUBLICATIONS NOT SUBJECT TO "SALES TAX"

(No. 9418—*Librarian, Municipal Reference Library—A.F.G.—January 30, 1937—5½ pp.*)

The Municipal Reference Library, in selling publications such as the electrical, plumbing, fire prevention, and undertaking codes, the Chicago Zoning ordinance, and the Revised Chicago Code of 1931, as authorized by the City Council for the convenience of the public, is not subject to the Retailers' Occupation Tax act. In selling copies of these publications the City is not engaged in the business of selling tangible personal property but in the governmental function of rendering service to its citizens.

Citations:

Ordinances: Code '31: 631, 632, 637, 639.

Statute: Retailers' Occupation Tax act, sec. 1, 2.

Cases: *Marin Municipal Water District v. Chenu*, 188 Cal 734, 207 Pac 251 (1922).

Morningstar v. Alabama, 135 Ala 66, 33 So 485 (1902).

Hewin v. Atlanta, 121 Ga 723, 49 SE 765 (1904).

Beickler v. Guenther, 121 Iowa 419, 96 NW 895 (1903).

Smallwood v. Jeeter, 42 Idaho 169, 244 Pac 149 (1926).

Louisiana v. Boston Club, 45 La Ann 585, 12 So 895 (1893).

Deering v. Blair, 23 F(2d) 975 (1928).

Peoples' Gas Light and Coke Co. v. Ames, 359 Ill 152 (1935).

Other references: *Cooley, Taxation*, (4th ed.), sec. 1695, p. 3407.

Bouvier, Law Dictionary, "business."

OPINION OF FOREGOING SYNOPSIS

Your letter of January 11, 1937, states that the Illinois Department of Finance has advised you that sales of publications prepared and sold for the convenience of the public under authority of section 637 of the Revised Chicago Code of 1931, including copies of the electrical, plumbing, fire prevention and undertaking codes, the Chicago zoning ordinance, as well as the Revised Chicago Code of 1931, are subject to the "Retailers Occupation Tax act."

You ask to be advised if the Municipal Reference Library in making sales of this nature is subject to or exempt from the Illinois Retailers Occupation Tax law.

The Municipal Reference Library is a department of the City government established by ordinance of the City Council. Section 631 of that ordinance creates the office of Municipal Reference Librarian. Section 632 makes it his duty "to collect, compile and publish, whenever directed so to do by the city council or the mayor, statistics and information relating to the city of Chicago * * *."

Section 637 is in part as follows:

"* * * He is hereby authorized and directed to *sell for cost* any surplus copies of publications of the city of Chicago in his charge the distribution of which is not otherwise directed by law or by order of the city council. The selling price of such publications, unless the price thereof is fixed by law, shall be determined by a board consisting of the municipal reference librarian and the business agent, and *such price shall be sufficient to cover the cost of paper, handling and printing.* All money to be received under the provisions of this ordinance shall be turned over to the city collector daily, and all necessary financial records shall be kept under the supervision of the city comptroller."

Section 639 provides in part:

"* * * No publications shall be sold by any department, bureau, division, board or commission, unless the sale thereof shall be specifically authorized by the city council."

The title of the act under which this tax is claimed is as follows: "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." Section 2 of the act as amended in 1935 is as follows:

"A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of two per cent (2%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business upon and after the taking effect of this Act and prior to July 1, 1935, and at the rate of three per cent (3%) of the gross receipts from such sales on and after July 1, 1935, and prior to January 1, 1937, and two per cent (2%) of the gross receipts from such sales after December 31, 1936. However, such tax is not imposed upon the privilege of engaging in any business

in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

Both the title of the act and section 1 which imposes the tax contemplate that the person subject to the tax shall be engaged in a business. The word "business" and the phrase "engaged in business" when used in a legislative sense are uniformly construed to signify the following of an employment or occupation for the purpose of making a livelihood or profit. Many cases so hold. In the case of *Marin Municipal Water District v. Chenu*, 188 Cal 734, 207 Pac 251, not only was the term "business" construed in this way, but also it was held that a municipally owned and operated waterworks is not conducted for the "purpose of profit" and therefore is not engaged in business.

Cooley in his work on *Taxation*, 4th edition, 1924, section 1695, page 3407, says:

"'Business' where made subject to a tax ordinarily means business in the trade or commercial sense, carried on for profit."

Bouvier defines "business" as "that which occupies the time, attention and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation and employment."

The overwhelming weight of authority throughout the country supports the construction that the term "engaged in business" means the following of an employment for the purpose of a livelihood or profit.

Morningstar v. State, 135 Ala 66, 33 So 485;

Hewin v. City of Atlanta, 121 Ga 723, 49 SE 765;

Beickler v. Guenther, 121 Ia 419, 96 NW 895;

Smallwood v. Jeeter, 42 Idaho 169, 244 Pac 149;

State v. Boston Club, 45 La Ann 585, 12 So 895, 20 LRA 185;

Deblois v. Commissioner of Corporations and Taxation, 276 Mass 437, 177 NE 566;

Semple v. Schwartz, 130 Mo App 65, 109 SW 633;

Nelson v. Stukey, 89 Mont 277, 300 Pac 287, 78 ALR 483;

State v. Rubenstein, 112 Ore 179, 228 Pac 918;

Marsh v. Groner, 258 Pa 473, 102 Atl 127;

LaCroix v. Frechette 50 RI 90, (1929);

Morgan v. Salt Lake City, 78 Utah 403, 3 P (2d) 510;

Vandervort v. Industrial Commission of Wisconsin, 203 Wis 362, 234 NW 492;

Deering v. Blair, 23 F(2d) 975.

In construing an act similar to the act now under discussion, which had the same title and the tax provided therein was imposed on the same class as in the present act, our Supreme Court held in *Peoples Gas Light and Coke Co. v. Ames*, 359 Ill 152, that public utility companies were not subject to the act for the reason they were not engaged in the business of

selling tangible personal property, but rather were engaged in rendering service to the public. Surely, if a public utility corporation organized for profit in selling the commodity in which it deals is not subject to such an act, how can a municipal corporation which exists for the purpose of government and is not permitted to engage in any profit making activity be held to be subject to the act?

A municipality is a creature of the legislature and exists for the purpose of government and its activities which are permitted by the statutes are for and in behalf of the public. Ordinances are enacted in pursuance of the police power vested in the municipality by the State. Regulations concerning buildings, health, electricity, fire prevention, zoning, etc., are adopted in the interest of public safety, health, comfort, and welfare. Laws cannot be observed or enforced unless the public knows what the law is. In order to acquaint the public with the regulations they are to observe, the City Council has authorized by ordinance the Municipal Reference Librarian to cause to be printed in book or pamphlet form the Code of the City or excerpts from the Code such as the building code, the electrical code, the fire prevention code, the zoning ordinance, etc., and to sell to lawyers, architects, builders, insurance companies and others these publications *at cost*. In doing this the city of Chicago is not engaged in the business of selling tangible personal property but rather in the exercise of its governmental functions in rendering service to the citizens of the municipality. The sale which only can be made when "specifically authorized by the City Council" is but incidental to the main purpose of serving the public.

We are, therefore, of the opinion that the Municipal Reference Library in making sales of this nature is not subject to the "Retailers Occupation Tax act."

CHAPTER XII

CONTRACTS

A. BIDS AND AWARDS

AWARD TO LOWEST RESPONSIBLE BIDDER

(No. 9114—*Commissioner of Public Works—J.J.S.—April 4, 1936—1½ pp.*)

The Commissioner of Public Works may accept the third lowest bid if it appears that the two low bidders have not sufficient experience to perform the contract. There is no obligation on a City official to accept the lowest bid. The obligation is to accept the lowest responsible bid unless otherwise directed by the City Council.

ADVERTISING FOR BIDS ON BASIS OF AMOUNT OF WORK FOR SET PRICE

(No. 9593—*Commissioner of Public Works—A.A.S.—August 16, 1937—1½ pp.*)

Advertising for bids for the construction of a dock-wall wherein the bidders would all bid the same sum but might possibly vary as to the length of the dock-wall they would construct for that sum would be improper. The bids submitted must be uniform so far as the details of the project are concerned, which would mean that the advertising for the bids must set forth the length of the dock-wall together with other necessary specifications.

PRINTING OF LAW DEPARTMENT ABSTRACTS AND BRIEFS

(No. 9550—*City Comptroller—J.F.G.—June 29, 1937—2½ pp.*)

The printing of abstracts and briefs in the course of litigation handled by the Department of Law does not fall within the classification of supplies, materials, equipment, and contractual services within the meaning of the Revised Chicago Code of 1931 which requires the letting of contracts to the lowest responsible bidder after advertisement by the Bureau of Central Purchasing. The printing of abstracts and briefs involves a more or less technical service by printers who specialize in that class of work, who are familiar with the rules and practices of courts of appeal in this State, and who are equipped to serve the necessary notices and to file the necessary documents in the courts in accordance with the rules of the courts.

Citations:

Ordinances: Code '31: 155-A, 222-238.

Case: Potts v. City of Utica, 86 F(2d) 616 (1936).

B. EXECUTION AND INTERPRETATION

EXECUTION OF CONTRACT UNDER ANNUAL APPROPRIATION BILL

(No. 9399—*Acting Commissioner of Streets and Electricity—J.F.G.—January 15, 1937—2½ pp.*)

The annual appropriation bill of 1937 being no longer subject to veto and needing only the ministerial duty of the City Clerk to publish it to make it effective, the Acting Commissioner of Streets and Electricity may execute a contract for which that appropriation bill has provided. Although the 1937 appropriation ordinance will become effective on January 25th, it will relate back to January 1, 1937.

Citations:

Ordinance: Annual Appropriation bill of 1937.

Statute: Cities and Villages act, art. VII, sec. 4.

RENEWAL OF CONTRACT BY COUNCIL ORDER

(No. 9145—*Commissioner of Public Works—J.J.S.—May 4, 1936*
2½ pp.)

An order of the City Council authorizing the renewal of a contract for a period of four months is not authority to extend or continue the original contract, but to enter into a new contract within the limit of the appropriation in the annual appropriation ordinance by adopting the terms and conditions of the original contract. This new contract will expire in four months.

Citation: Coun. J. (1935-36) p. 155, 1520, 1578.

LETTING OF CONTRACTS FOR IMPROVEMENTS PAID FROM VEHICLE TAXES

(No. 9352—*J.J.S.—December 4, 1936—3½ pp.*)

The City Council has the right, under its broad power to provide the manner of letting of contracts, to designate the Board of Local Improvements as its agent in the letting of contracts for public improvements when the City's share of the cost is to be paid from the Illinois motor fuel tax funds.

Citations: ISBS '35, 24: 121, 122; 95a: 88(1).

COUNCIL'S APPROVAL OF RELIEF CONTRACTS EXCEEDING \$2,500

(No. 9368—*Commissioner of Relief—A.F.G.—December 14, 1936—2 pp.*)

No section of the Revised Chicago Code of 1931 of general application requires contracts by the Commissioner of Relief exceeding \$2,500 to be approved by the City Council.

Citation: Code '31: 511.

DURATION OF CONTRACT LIMITED

(No. 9213—*Commissioner of Public Works—J.J.S.—July 1, 1936*
—1½ pp.)

The City lacks statutory authority to enter into a contract for a term of five years for the supplying of electrical energy for a public building, as contracts for supplies are limited to one year.

Citations:

Ordinance: Code '31: 222.

Case: Avery v. Chicago, 345 Ill 640 (1932).

CONTRACT FOR LICENSE PLATES—EXTENSION OF CONTRACT BEYOND FISCAL YEAR

(No. 9335—*City Clerk—J.F.G.—November 19, 1936—5 pp.*)

A contract which provides for a specified number of license plates and badges to be manufactured and delivered to the City for a lump sum price and for additional plates and badges at a unit price, and which provides for payment up to eighty-five per cent of the value of plates and badges delivered and accepted and the reservation of the remaining fifteen per cent of the contract price until final completion of the contract to the satisfaction of the City Clerk, should be divided into two independent parts for purposes of payment.

The first part is the manufacture and delivery of the specific quantity of license plates and badges for a lump sum price, and upon satisfactory delivery of this quantity, the contractor is entitled to payment of the fifteen per cent reserve. The second part of the contract is for extra license plates and badges ordered as necessary at a unit price, and each order for the delivery of a specific number of extra license plates and badges should be treated independently and the full contract price paid when completed and delivered to the satisfaction of the City Clerk.

A contract may not be entered into by the City to extend beyond the end of the fiscal year in which the contract was entered into, as there must be an appropriation to support the entire obligation of the contract. When it is desired that the

contractor shall be bound beyond the fiscal year, there should be written into the contract a provision for an option on the part of the City to extend the contract beyond the fiscal year by authority of the City Council.

Citations:

Ordinance: Code '31: 155a, as amended Coun. J. (1933-34), p. 1046.

Other reference: 18 Op. Corp. Coun. 841 (No. 8027).

PURCHASE OF ADDITIONAL LICENSE EMBLEMS

(No. 9734—*City Comptroller—M.H.F.—December 24, 1937—2½ pp.*)

Authorization by the City Council is not necessary for the payment of extra supplies under a contract for the purchase of a specified number of license emblems for a specified total sum and for the purchase of additional emblems, as may be required during the year, at prices which are set forth in the contract, as these prices have not been increased by any alteration in the plans or specifications. The City Clerk may purchase these additional emblems so long as there is a sufficient unexpended appropriation to pay for them.

Citations:

Ordinance: Code '31: 155-A.

Other reference: 18 Op. Corp. Coun. 841 (No. 8027).

OVERRUN ON CONTRACT ITEM

(No. 9141—*Commissioner of Public Works—J.J.S.—April 30, 1936—2½ pp.*)

Separate unit bids are not individual contracts in themselves but are merely parts of the entire contract, and the price to be paid is determined by the quantity of material actually furnished.

Quantities in the bidding specifications of a contract are only estimates, and, if the total cost is within the amount appropriated for the contract, there is no necessity for action by the City Council to cover an overrun in any item of the contract.

EFFECT OF FEDERAL PAYROLL TAX ON CONTRACT PRICE

(No. 9426—Commissioner of Public Works—R.N.—February 9, 1937—2 pp.)

A specification in a coal contract that the contract price shall be increased or decreased to compensate for an increase or decrease in the wages of the miners or allied trades does not permit an increase in the contract price because of the levying of payroll taxes under the Federal Social Security act. A Federal tax on payrolls cannot be construed as an increase in wages.

OPINION OF FOREGOING SYNOPSIS

We have examined specifications for contracts submitted by you for the delivery of coal for general City delivery and for pumping stations and plants under which you state certain companies are claiming an additional sum per ton for coal delivered on and after January 1, 1937, by reason of the tax imposed by the Federal Social Security act.

The three claims, copies of which you sent us, * * * * * are based upon section X of the specifications which relates to increase or decrease of the contract price per ton due either to change in freight rates or to change in wages of miners or allied trades. That part of section X with which we are here concerned reads:

"Should the wages of miners or allied trades employed in the contractor's mines specified herein be increased above or decreased below the scales in force on date of receipt of bids, there shall be added to or deducted from the price paid to the contractor, an amount equivalent to such increase or decrease."

The statement there is concise and simple. It relates specifically to "wages of miners or allied trades" as the basis for a change in the contract price.

By the terms of the Federal Social Security act, a tax on payrolls of two per cent for unemployment compensation and one per cent for old age pension is required to be paid by the employers, in this case the coal producers. We do not think that by any reasoning a Federal tax imposed on payrolls can be construed as an increase in wages.

In addition it appears that on the first page of the proposal the following provision is made.

"The prices herein include all State and/or Federal, direct and/or indirect taxes."

For the reasons stated herein we are of the opinion that the city of Chicago is not liable for the claims presented. * * *

C. CONTRACTORS' LIENS

SUBCONTRACTOR'S LIEN AGAINST CITY FUNDS

(No. 9053—City Comptroller—J.J.S.—February 13, 1936—
2 pp.)

A subcontractor has the right under the Mechanics' Lien act to file a lien or claim against public funds due the contractor. The City Comptroller should hold the amount claimed, notify the claimant that his notice has been received, and advise him either to adjust his claim with the contractor or to take action to have the claim adjudicated.

Citation: ISBS '35, 82: 23.

LIEN FOR SERVICES FURNISHED CONTRACTOR FOR PUBLIC IMPROVEMENT

(No. 9367—City Comptroller—N.N.E.—December 14, 1936—
1½ pp.)

The City Comptroller, when served with a written notice of lien by any person claiming to have furnished services or materials to any contractor having a contract with the City for a public improvement, should withhold a sufficient amount to pay this claim until it is admitted by the contractor, adjusted by agreement of the parties, or there has been an adjudication of the claim in a court of competent jurisdiction. Thereupon, he should pay the amount so determined to the claimant.

Citation: ISBS '35, 82: 23.

CHAPTER XIII

RIGHTS AND DUTIES OF CITY EMPLOYEES

A. CIVIL SERVICE

CLASSIFICATIONS OF TUBERCULOSIS SANITARIUM EMPLOYEES

(No. 9299—*Secretary, Municipal Tuberculosis Sanitarium*—Q.O.
—October 2, 1936—3 pp.)

The Civil Service Commission has no power to adopt rules establishing classes and grades and to hold examinations for doctors and nurses exclusively for the Municipal Tuberculosis Sanitarium, as such a limitation would discriminate against physicians and nurses of other departments of the City.

Citations:

Statute: Civil Service act, sec. 3, 6, 9.

Cases: *People v. Kipley*, 151 Ill 44 (1894).
Chicago v. Luthardt, 191 Ill 516 (1901).
People v. Errant, 229 Ill 56 (1907).

Other reference: Civil Service Commission, Rule 1, sec. 5.

OPINION OF FOREGOING SYNOPSIS

Replying to your letter to Corporation Counsel Barnet Hodes under date of September 29, 1936, and your request for an opinion therein contained, we note you say that:

"The Civil Service Commission at the present time has eligible lists for doctors and nurses from which they certify doctors and nurses to the City, Board of Education and Sanitarium.

"The work at the Sanitarium is highly specialized and it is the view of this Board that doctors and nurses to be employed at the Sanitarium in the future should have the qualifications that will especially fit them for service at the Sanitarium."

You therefore ask:

"Whether the Civil Service Commission has power to adopt rules establishing classes and grades and hold examinations for doctors and nurses to be employed at the Sanitarium, or if it would require action by the legislature."

Under the Civil Service law of Illinois applicable to the city of Chicago, its school board and your sanitarium, the power to make classifications is vested in the civil service commissioners of the city of Chicago, but the courts have held that this power cannot be exercised arbitrarily, and that the classification of positions in the civil service must be made according to certain recognized principles. *People v. Kipley*, 151 Ill 44; *City of Chicago v. Luthardt*, 191 Ill 516; *People v. Errant*, 229 Ill 56.

Section 3 of the Civil Service act provides that classification shall be made "with reference to the examinations hereinafter provided for," and section 6 of that act provides that "all applications for offices or places in said classified service * * * shall be subject to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits, and moral character." Section 9 provides that "the commission shall, by rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination, and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations," and section 3 of said act declares that "the offices and places so classified by the commission shall constitute the classified civil service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned."

From the foregoing provisions of the Civil Service act it is clear that the civil service law, as applied to cities in Illinois, provide for but one classified civil service, and for one set of civil service commissioners for the whole City and all its departments, and that it was not the intent of the legislature and is not within the purview of the law to permit any department of the City service to be separated and segregated from the other departments for the purposes of civil service examinations and promotions so as to constitute a separate and distinct class confined to one department. To limit eligibility to departments would make it possible to create as many independent civil service systems as there are departments in the City service.

It is manifest that both the letter and spirit of the Civil Service act as construed by our courts will not permit of such classification and segregation in departmental compartments.

Furthermore, section 9 of the Civil Service act provides that "all examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examinations." Section 5 of rule 1 of our Civil Service Commission declares that "rank shall be held to include only those offices and places of employment performing the same particular kind and character of work and of equal au-

thority and precedency," and our Supreme Court in *People v. Errant*, 229 Ill 56, at pp. 64, 65, in construing the Civil Service act and said rule, declared that "the same line of employment means those positions in the various departments the duties of which are so related to the duties of the higher place that a thorough knowledge of them is in a degree preparatory for the duties of the higher position."

It would, therefore, be contrary to the Civil Service law and its spirit to limit the eligibility and promotion to the position of physician and nurse in the Municipal Tuberculosis Sanitarium to those serving in that single department, and thereby discriminate against or bar out other physicians and nurses who are not employed in said sanitarium, but who might successfully pass a civil service examination for said positions, if they had the training, learning and practical experience and specialized skill required for said positions.

We have examined the present classification of the Civil Service Commission of Chicago pertaining to the positions of which you speak and find that said positions are classified under Branch III—Health and Welfare, and that the physicians come under class M—medical service, and that dispensary physicians are in Grade 3, senior position. We also note that the dispensary physicians are designated "M. T. S.," which means Municipal Tuberculosis Sanitarium, and that neither the classification chart nor the appropriation ordinance provide for dispensary physicians for any other department of the classified city service except the Municipal Tuberculosis Sanitarium.

Wherefore, if we understand the full purport of your letter and your objectives therein referred to, the present classification in that regard, which goes as far as the present law and decisions now warrant, should meet your requirements.

CIVIL SERVICE TEMPORARY APPOINTMENT

(No. 9029—Q.O.—January 30, 1936—1½ pp.)

A sixty day temporary appointment to a position in the classified civil service may be made only when there is no eligible civil service candidate for the position.

SICK LEAVE FOR TEMPORARY EMPLOYEE

(No. 9546—City Physician—F.V.M.—June 21, 1937—2 pp.)

A City employee holding a sixty day appointment who, while off duty, was injured in an automobile accident to such an extent

that he was away from his employment for two weeks, may be paid for that period of two weeks and the period be considered as sick leave, provided he is not an officer or employee of the Board of Education, the Chicago Public Library, the Municipal Tuberculosis Sanitarium, the Municipal Court, the Board of Election Commissioners, or the Department of Law, nor an active member of the Police or Fire departments.

Citation: Council order, Coun. J. (1936-37), p. 2887.

CITY EMPLOYEE IN DANGEROUS PHYSICAL OR MENTAL CONDITION

(No. 9460—City Physician—G.F.M.—March 19, 1937—2½ pp.)

When the City Physician knows that a City employee is in a physical or mental condition which renders further employment of him dangerous both to him and the public, the City Physician has an implied duty to report immediately to the employee's department head his condition.

If the employee is a sixty-day employee, the department head has power to discharge him. If he is a civil service employee, the department head should suspend him for a period of not exceeding thirty days and should suggest to the employee that he apply for a disability benefit from the pension fund, which would take him out of the service during the period of his disability.

If the employee refuses to take a leave of absence and his disability benefit, then it would be the duty of his department head to file charges against him before the Civil Service Commission setting forth the situation as it exists and as it affects both the City service and the safety of the public.

Citation: ISBS '35, 24: 697.

OPINION OF FOREGOING SYNOPSIS

Referring to your inquiry as to your duty in a case where you have knowledge that a City employee is in a physical or mental condition which renders further employment of such person dangerous both to the person

and to the public, there is an implied duty on your part and on the part of every person connected with the Health department of a municipality to promote the safety as well as safeguard the health of the public whom he is serving. In the case you refer to, and in similar cases, an immediate report should be given to the head of the department in which the afflicted person is employed, with a statement as to the reasons which render dangerous the continued service of the employee in question.

The City faces a financial risk in cases of this character in that the City might be held liable for injuries or damage caused by the employee, if at the time of the occurrence the employee was serving the City in its corporate capacity as distinguished from its governmental capacity. The head of the department might also render himself subject to legal proceedings if he knowingly, and after receiving notice of the said dangerous condition of the employee, continued such employee in the service. There is a further financial risk to the taxpayers of the City in the fact that if the employee in question became disabled as a result of an injury while in the performance of an act of duty, the taxpayers would be obliged to pay him workmen's compensation, and duty disability through the pension fund, which latter amount (according to the nature of the disability) would be fifty per cent or seventy-five per cent of the employee's salary during the entire period of his disability, which might extend during his entire lifetime.

Under the provisions of section 12 of the act relating to civil service in cities (Illinois State Bar Statutes, 1935, chap. 24, sec. 697) the head of a department has power to suspend a subordinate for a reasonable period, not exceeding thirty days, which action should be taken immediately upon notice of the dangerous condition to which you refer in your letter. If the employee is a sixty day employee, the head of the department has the power to discharge him. If the employee is a civil service employee, then the head of the department should suggest to the employee that he apply for disability benefits from the pension fund, which would take him out of the service during the period of his disability. If the employee refused to take a leave of absence and disability benefits during his disability, then it would be the duty of the head of his department to file charges against the employee before the Civil Service Commission, setting forth the situation as it exists and as it affects both the service to the City and the safety of the public.

RESIGNATION OF MENTALLY ILL EMPLOYEE

(No. 9288—Assistant Commissioner of Streets and Electricity—*G.F.M.*—September 18, 1936—2 pp.)

The resignation of an employee who is mentally ill, and for whom a conservator has been appointed, can be made only by his conservator.

Citation: ISBS '35, 86: 5.

CIVIL SERVICE STATUS OF FORMER PENSIONER

(No. 9031a—*City Fire Marshall—Q.O.—January 31, 1936—2½ pp.*)

A civil service employee retains his status as such, notwithstanding that he was disabled for a long time and the short period of his prior service has absorbed all of his accumulated pension, necessitating his removal from the pension rolls. Such an employee is entitled to be reassigned when he has recovered from his disability and a vacancy is open for him.

DISCHARGE OF CIVIL SERVICE PROBATIONERS

(No. 9215—*Deputy acting for the Mayor, Department of Buildings—Q.O.—July 2, 1936—3 pp.*)

Civil service employees who were discharged by a department head a few days before the end of their six months probationary period without the department head having received a notice in writing that the Civil Service Commission approved the discharge were merely laid off and became entitled at the end of their six months probationary period to be placed on the reinstatement list.

Citations:

Statute: Civil Service act, sec. 10.

Other reference: Civil Service Commission, rule IV, sec. 5.

CANCELLATION OF DISCHARGE ORDER OF CIVIL SERVICE EMPLOYEE

(No. 9189—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G.F.M.—June 3, 1936—1½ pp.*)

The cancellation of an order of discharge of a civil service employee makes the civil service status of that employee the same as if he had never been discharged but had been continuously in the service. Therefore such an employee who attained the age of sixty-five years during the period of his discharge is entitled to his annuity.

SUSPENSION FROM CIVIL SERVICE

(No. 9229—Chairman, Committee on Finance—C.H.L.—July 13, 1936—3 pp.)

A civil service employee who was suspended by the head of his department for thirty days without charges being preferred against him before the Civil Service Commission has the right to be put back to work at the end of the thirty days.

Unless some other person occupied the position and drew the salary attached to it, the employee is entitled to the salary from the end of his suspension to the date of his actual discharge from the civil service.

Citation: Civil Service act, sec. 12.

OPINION OF FOREGOING SYNOPSIS

Replying to your request of June 11, 1936, for an opinion as to the City's attitude in regard to the salary claim of one Edward Reiter, a former civil service employee in the Water bureau, we submit the following:

From divers letters, Civil Service Commission documents, and a copy of Municipal Court trial sheet in the case of *People v. Reiter*, No. 328015, we are able to gather the following facts which have a bearing on the case.

1. July 30, 1934—Reiter suspended pending charges.
2. No suspension report filed with the Civil Service Commission within 30 days.
3. August 7, 1934—Information filed against Reiter for cheat and defraud—Alteration water meter in the above criminal case in the Municipal Court.
4. August 15, 1934—Reiter arraigned and pleaded guilty; case continued.
Affidavit of surety filed. Bond \$2,000.00.
5. August 22, 1934—Case continued to September 15, 1934.
6. September 15, 1934—Case continued to October 10, 1934.
7. October 10, 1934—Case continued to November 30, 1934.
8. November 30, 1934—Case continued to January 11, 1935.
9. January 11, 1935—Case continued to January 18, 1935.
10. January 18, 1935—Reiter's application for probation sustained; released one year and cause continued to January 17, 1936.
11. It appears that after 30 days from date, July 30, 1934, upon which Reiter was suspended, he reported for work several times, but was not put back to work.
12. February 25, 1935—Charges filed against Reiter before Civil Service Commission.
13. March 6, 1935—Reiter discharged from service.

It is our opinion that this case is governed by section 12 of the Civil Service act, the first part of which reads as follows:

*"Sec. 12. Removals. No officer or employee in the classified service of any city who shall have been appointed under said rules and after said examination shall be removed or discharged except for cause * * * *. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."*

Under the decisions of our Supreme Court, the power to suspend for a period not exceeding thirty days in disciplinary matters and for other causes is lodged in the heads of departments, and the subject matter here under consideration is the suspension of a civil service employee which is so placed within the exclusive jurisdiction of the head of a department.

When Reiter was suspended on July 30, 1934, by the Commissioner of Public Works pending charges, the Commissioner acted within his authority and the suspension was a valid one for 30 days, viz. up to August 29, 1934.

According to the facts submitted to us, no charges were brought against the claimant within those 30 days and he reported back for work.

He should then have been put back to work. Charges were brought against him before the Civil Service Commission on February 25, 1935, and he was discharged on March 6, 1935.

Unless the facts are and can be shown to be that some other person occupied the position left vacant by Reiter's suspension and drew the salary therefor as such truck chauffeur, it is our opinion that Reiter had the right to continue in the performance of his duties from August 29, 1934, until March 6, 1935, and receive his salary therefor without any other deductions than the 47 days deducted from the salaries of all other City employees during that period.

* * * * *

REINSTATEMENT RIGHTS AFTER LEAVE OF ABSENCE

(No. 9467—Commissioner of Police—Q.O.—March 30, 1937—
3½ pp.).

When a civil service employee returns from a leave of absence and within the proper time notifies his department head that he is ready and willing to assume work in the position from which he took leave, it is the duty of his department head to assign him to work if there is a vacancy in the position, or if

the position is being held by a temporary appointee who is not in the classified service. If there is no vacancy in the position, or the position has been filled by a civil service employee from the classified register or the reinstatement list, the returned employee is entitled to have his name put on the reinstatement list for the position from which he took leave in the order of his seniority by the Civil Service Commission upon a report of the facts by the department head.

Despite the fact that a person who has returned from a leave of absence may be physically and mentally unfit and unsafe to serve as a policeman, he is nevertheless entitled to reinstatement to his position as policeman or to have his name certified for listing on the reinstatement list. He cannot lose his civil service status or his right to his position because of illness or disability until there is a finding to that effect by the Civil Service Commission after a hearing on charges at which he has an opportunity to be heard.

STATUTORY DEFINITION OF "FIREMEN"

(No. 9268—*Secretary, Civil Service Commission—C.H.L. and Q.O.—February 18, 1936—4 pp.*)

The word "firemen" in the Policemen and Firemen Retirement act of 1935³¹ includes all persons employed in the Fire department who are entitled to participate in the Firemen's Annuity and Benefit fund.

Citations:

Statute: Policemen and Firemen Retirement act (1935), sec. 2.
Firemen's Annuity and Benefit Fund act, sec. 12.

Ordinance: Code '31: 332.

Case: Hunt v. Chicago Horse and Dummy Railway Co., 121 Ill 638 (1887).

Other reference: Words and Phrases (2nd series), vol. 2, p. 991.

³¹ This act was held invalid in *Malloy v. Chicago* [365 Ill 604 (1937)] as delegating arbitrary power.

CHIEF FIRE ALARM OPERATOR AS "FIREMAN" FOR RETIREMENT PURPOSES

(No. 9265—*Chief Fire Marshall—A.F.G.—August 24, 1936—*
2 pp.)

The Chief Fire Alarm Operator is a "fireman" within the meaning of that word as used in the Policemen and Firemen's Retirement act³², since he is entitled to the benefits of the Firemen's Annuity and Benefit fund. Therefore, he is subject to retirement on reaching the age of sixty-three.

Citations:

Ordinance: Code '31: 332.

Other reference: Opinion No. 9268 (this volume, p. 406).

RECONSIDERATION OF POLICEMEN'S RETIREMENT BECAUSE OF AGE DISCREPANCY

(No. 9297—*Commissioner of Police—Q.O.—September 30, 1936—*
—2½ pp.)

The petition of a policeman seeking a reconsideration of his retirement on the grounds of an alleged age discrepancy cannot be considered when the policeman misstated his age in his application for appointment to the civil service, even though he claims it was innocently and inadvertently done, since the age stated in his application is conclusive, and since he discovered the discrepancy twelve years ago and did nothing to correct it until after his retirement.

Citation: Civil Service act, sec. 12.

³² See footnote 31, p. 406.

B. SALARIES

REPEAL OF APPROPRIATION PROVISION CONCERNING BASIC SALARIES FOR CIVIL SERVICE CLASSIFICATION

(No. 9693—Civil Service Commission—J.F.G.—November 5, 1937—2½ pp.)

The repeal of the section of the annual appropriation ordinance providing that the basic rates of pay specified in the ordinance for offices and positions of the City, which were higher than the salaries actually appropriated, should be the rates used for purposes of classifying offices and positions under civil service rules does not affect provisions in the Revised Chicago Code of 1931 pertaining to the classification of offices and positions on the basis of salaries. The effect of the repeal is merely to make the salaries actually appropriated the basis of civil service classification.

Citations: Code '31: 669-673.

Annual appropriation ordinance of 1937, sec. 8, 9.

OPINION OF FOREGOING SYNOPSIS

We have your letter of October 6, 1937, to which is attached letter from the Committee on Finance in regard to salary increases for employees of that body for the year 1937.

It appears that the City Council in its annual appropriation bill passed January 5, 1937, fixed the basic rate of compensation of certain employees of the Committee on Finance, before deductions as provided in section 8 thereof, at an amount in excess of the rate used by the Civil Service Commission in determining the grades and ranks of their positions under the civil service rules.

Section 9 of the annual appropriation ordinance provided that "the rate of compensation of offices and positions fixed herein, before deductions as provided in section 8 hereof, shall be used in determining the grades and ranks of the offices or positions under civil service rules."

On January 25, 1937, you advised the Chairman of the Committee on Finance that the report submitted to you containing salary changes had been refused by the Commission and cited section 9 of the appropriation ordinance above referred to as its reason for disapproval of the changes.

In the supplemental and amendatory appropriation ordinance for the year 1937, passed August 5, 1937, pursuant to statutory authority, section 9 of the annual appropriation bill was expressly repealed.

The specific question which you submit for answer is whether the repeal of section 9 also repealed sections 669 to 673, both inclusive, of the Revised Chicago Code of 1931 referred to in the repealed section 9.

The sole object of the incorporation of section 9 in the annual appropriation bill was to retain as the official rate of compensation for purposes of classifying offices and positions under the civil service rules the so-called "basic rate" of compensation, that is, the rate before deductions as provided in section 8. Without section 9 the amounts appropriated for the salaries and wages of officers and employees of the City, after deductions as provided in section 8, would necessarily have been the official rate of compensation governing classification of offices and positions under the civil service rules as provided in sections 669 to 673 of the Revised Chicago Code of 1931. The repeal of section 9 did not affect the provisions of the code referred to; much less did it operate as a repeal of said sections of the code.

RESTORATION OF SALARY DEDUCTIONS BY LIBRARY BOARD OF DIRECTORS

(No. 9245—*Secretary, Chicago Public Library*—J.F.G.—July 24, 1936—2½ pp.)

The restoration to employees of the Public Library of fourteen days' pay deducted in 1931 lies wholly within the jurisdiction and power of the Board of Directors of the Public Library.

ATTORNEY'S LIEN ON INCREASED COMPENSATION TO EMPLOYEES WAIVING BACK SALARIES³³

(No. 9608—*Chairman, Committee on Finance*—J.F.G.—September 3, 1937—2 pp.)

An attorney who has a contract with certain City employees to collect by suit or otherwise back salaries for the years 1932 to 1935 by which those employees agree to pay the attorney ten per cent of any money he may collect for them by suit or

³³ The Illinois Appellate Court held in *People ex rel. Jacobson v. Chicago* [289 Ill App 622, 7 NE (2d) 505 (1937)] that attorneys who obtained a lien on money received by city employees on the ground of a contract of employment could not thereafter seek to sustain the lien against money received by employees who did not employ attorneys.

otherwise is entitled to at least ten per cent of the increase in compensation received by any employee who waives any claim for back salary. The increase so obtained by the employee is in the nature of the proceeds of a settlement of his claim for back salary.

Wherever notice of an attorney's lien against the proceeds of any settlement of a back salary case has been filed, the effect of the notice is the same as an assignment to the attorney of a part of the proceeds of the settlement, and it is such an assignment as the City is probably bound to respect. The City Comptroller, therefore, ought to withhold the percentage of the increased compensation to which the attorney by his contract is entitled until such time as the attorney releases his lien.

Citation: *Baker v. Baker*, 258 Ill 418 (1913).

WAIVER OF SALARY CLAIM BY STIPULATION

(No. 9540—City Comptroller—J.F.G.—December 31, 1937—2 pp.)

An employee desiring to have his basic salary restored under the supplemental appropriation ordinance should deliver to the City Comptroller his written waiver and release of all claims for salaries for any time prior to October 1, 1937, on account of deductions, in accordance with the provisions of the annual appropriation bills 1932 to 1937, notwithstanding that he alleges he waived all claims in stipulating facts in a law suit. Until he does so, his basic salary should not be restored as of October 1, 1937.

Citation: *Coun. J.* (1937-38), p. 4178.

CLAIM OF SALARY FOR PERIOD OF LEAVE OF ABSENCE

(No. 9451—Chairman, Committee on Finance—R.N.—March 9, 1937—2 pp.)

A claim for salary which is for a period covered by a leave of absence should not be allowed. An employee who has been

granted a leave of absence by the Civil Service Commission may not demand reinstatement during the period of that leave, but the department head at the employee's request may in his discretion terminate the leave before its expiration.

VACATION WITH PAY ON MEMORIAL DAY

(No. 9188—City Comptroller—J.F.G.—June 1, 1936—1½ pp.)

Persons employed by the City at a daily rate of pay are employed and reemployed each day, and as they do not regularly work on Saturdays they are not in the class of persons entitled to a vacation with full pay on the thirtieth day of May, 1936, which fell on Saturday.

Citation: Code '31: 666.

SALARY CHECKS OF INSANE FIREMAN

(No. 9376—City Comptroller—Q.O.—December 17, 1936—2 pp.)

An insane fireman is entitled to receive his salary checks during the period of his disability not exceeding one year, and the duly appointed conservator of such an insane fireman is authorized to receive and receipt for the salary checks due the fireman.

Citation: Code '31: 390 as amended, Coun. J. (1933-34), p. 982.

MONEY DUE DECEASED EMPLOYEE

(No. 9484—City Comptroller—C.N.—April 12, 1937—1 p.)

Money due a deceased City employee who has left no next of kin should not be disbursed until an administrator of the employee's estate has been appointed by the Cook County Probate court, and then only as directed by an appropriate court order.

PAYMENT OF COMPENSATION TO A DECEASED IMPOSTER EMPLOYED BY CITY

(No. 9005—Commissioner of Public Works—J.F.G.—January 8, 1936—1½ pp.)

If there is any money due for labor actually performed to an employee who worked for the City under an assumed name, the payroll should be issued in his rightful name on the theory that benefit of his labor, though under another name, was accepted by the City.

The family of an employee who worked under an assumed name and died during his vacation is not entitled to compensation for any part of his vacation period which had elapsed prior to his death, because, as the employee was an imposter, the City during his vacation period was not liable in the same manner as though labor had been actually performed and the benefits of it accepted by the City.

Death terminates any public employment and payment of compensation for a supposed vacation period after death is an unlawful diversion of public funds in aid of an individual.

PAYMENT OF DECEASED EMPLOYEE'S SALARY TO UNDERTAKER

(No. 9544—City Comptroller—G.F.M.—June 16, 1937—1½ pp.)

Where the wife of a deceased City employee has been missing for a period of more than seven years, the back salary due the employee may be paid direct to the undertaker upon an affidavit of the employee's daughter stating the facts, unless the estate is over five hundred dollars, in which event it should be administered in the Probate Court. The money should not be paid to the employee's daughter.

COLLECTION OF DEBTS OF EMPLOYEES

(No. 9256—*E.R.D.*—August 5, 1936—1½ pp.)

A creditor may proceed against a City employee with respect to income or property that he may have or own other than his City salary.

RECEIVER'S RIGHT TO EMPLOYEE'S SALARY

(No. 9264—*J.H.S.*—August 17, 1936—2 pp.)

A receiver appointed for the assets of a trust estate of a City employee has no control over the salary of that employee, since the salary under the circumstances could be no part of the trust estate, neither can a receiver collect the salary of a City employee.

Citation: *Lamb v. Lamb*, 256 Ill App 226 (1930).

PAYMENT OF POLICEMAN'S SALARY TO RECEIVER

(No. 9566—*City Comptroller—F.V.M.*—July 20, 1937—9 pp.)

The pay checks of a policeman for whom a receiver has been appointed should be paid directly to the policeman.

Citations: *Merwin v. Chicago*, 45 Ill 133 (1867).
Triebel v. Colburn, 64 Ill 376 (1872).
Addyston Pipe and Steel Co. v. Chicago, 170 Ill 580 (1897).
Chicago v. People, 98 Ill App 517 (1901).
Press and Co. v. Fahy, 313 Ill 262 (1924).
Lamb v. Lamb, 256 Ill App 226 (1930).
Goodwine State Bank v. Wise, 263 Ill App 291 (1931).

C. WORKMEN'S COMPENSATION

COMPENSATION TO INJURED EMPLOYEE

(No. 9634—Chairman, Committee on Finance—E.L.M.—October 8, 1937—5½ pp.)

The City cannot legally use public funds to compensate a person who was injured while working for the City as a street cleaner when the injury did not result from any neglect or misconduct on the part of the City. The failure of the Industrial Commission to award compensation to the claimant is not chargeable to any act or omission of the City.

The City as an employer is governed by the provisions of the Workmen's Compensation act, and may pay compensation as provided in the act to employees injured in the course of their employment only by authority of an award ordered by the Industrial Commission after a proper hearing as directed by statute. In the absence of such an award, the City is not authorized to use corporate funds for the payment of compensation to an employee injured in the course of his employment by virtue of the Workmen's Compensation act.

Citations: Petersburg v. Mappin, 14 Ill 193 (1852).

Agnew v. Brall, 124 Ill 312 (1888).

Chicago v. Pittsburg, Cincinnati, Chicago, and St. Louis Ry., 244 Ill 220 (1910).

OPINION OF FOREGOING SYNOPSIS

We have your letter, together with council paper and correspondence in the claim of Fiore Napatano, * * * for personal injuries. You request an opinion as to the liability of the City of the premises.

Mr. Napatano submits the following statement of his claim:

"My name is Fiore Napatano and I reside * * * in this city. I have been a resident and a taxpayer of the City of Chicago for 33 years.

"On August 7, 1934, I was working as a street cleaner for the City of Chicago, and about 8:30 a. m. I was working on Clark Street in front of the County Building when I slipped and fell on the street. I struck my right side and was badly stunned, as well as injuring my right leg. I was picked up by some citizens and placed on one of the street garbage boxes. I sat there for about ten minutes when Mr. Liberato Paradiso, a co-worker, came to my assistance and called a taxi cab

and took me to my home * * *. I asked him to notify the boss that I was hurt, which he said he would do. My boss at that time was Alfonso Marzullo, and Mr. Paradiso told me afterwards that Mr. Marzullo was on his vacation and that there was another boss. Up to that time I had worked for the City for 21 years.

"As a result of the accident I was home and confined to my bed for one year. I then attempted to get up but could not go out and stayed in my home until about the first of June, 1936. I was taken to the doctor three or four times but always with the help of my son-in-law, as it is impossible for me to walk alone. I am still suffering from the injury, and have been suffering great pain on the right side of my body, especially from my right hip down to my right knee. It is very hard for me walk (sic) with my right leg. I am 69 years of age and have had three doctors attend me but no doctor seems to be able to cure me.

"On June 1, 1936, I called on an attorney and tried to obtain some money under the compensation act, but he informed me that I could not do anything because I did not file my application within a year after the time of my injury, so I am asking you to kindly intercede for me with the City Council of the City of Chicago to have them give me some money so that I may be able to pay my expenses.

"I feel that I am justified in requesting this money, which I would have a right to obtain under the compensation law, as well as a pension, but, because of the fact that I am a poor man and never had any schooling, I was ignorant of the fact that I had to start proceedings before the Industrial Board within one year. I thought that I had to wait until I got out of bed before I could start any proceedings."

The Council paper digests the above claim as follows:

"For expenses incurred in connection with injuries sustained by a fall on August 7, 1934, at about 8:30 a. m., on N. Clark street in front of the County Building, while on duty as a street cleaner for the City of Chicago.

"Also for compensation under the Compensation Act and for money under the Pension Laws, claim for which is made by reason of having been obliged to discontinue work as a result of said injuries and because of the fact that the benefits under the above Act and Laws have not inured to Mr. Napatano on account of failure, through lack of knowledge as to the necessary procedure, to file application within a year after the time of injury."

The City Council has no power to determine pension rights of a City employee under the existing municipal employees' annuity and benefit funds established by statutory law. Claimant should present his claim for pension or benefits to the board of trustees of the particular municipal annuity and benefit fund in which he qualifies for participation. His appeal from the action of such board of trustees is to the courts.

Mr. Napatano states that he was injured in the course of his employment as a street cleaner for the City of Chicago; that while working on

Clark Street in front of the County building he slipped and fell on the street. He does not allege or indicate in any manner that his fall and resulting injuries were the result of any negligence on the part of the City, its officers, agents, or employees, but bases his appeal to the City Council on his right to compensation for injuries suffered in the course of his employment under the provisions of the Workmen's Compensation law.

Mr. Napatano further advises that no proceedings have been instituted before the Industrial Commission for compensation under the Workmen's Compensation act; consequently, no award was ever made in his case. He explains that he was ignorant of the statutory requirement that action must be commenced within one year of the date of the injury and because of that statutory limitation he is now barred from seeking relief in that tribunal.

The city of Chicago as an employer is governed by the provisions of the Workmen's Compensation act and may pay compensation as provided in the act to employees injured in the course of their employment only by authority of an award ordered by the Industrial Commission after a proper hearing as directed by statute. Therefore, the City in the absence of an award so ordered is not authorized to use corporate funds for payment of compensation to an employee injured in the course of his employment by virtue of the Workmen's Compensation law.

So far as the legal phases in this unfortunate matter are concerned, it is well settled that there is no legal liability on the part of the City for the injuries sustained by Mr. Napatano under the circumstances described by him and we find no authority for any payment for relief in such a case as this except in the proper administration of relief of poor and indigent persons. We call your attention to the case of *Petersburg v. Mappin*, 14 Ill 193. The court says in that case (pp. 194 and 195):

"The trustees of the town possess only such powers as are specifically conferred by the act of incorporation, or are necessary to carry into effect the powers expressly granted. They must keep within the limits prescribed by the charter. If they transcend the authority conferred thereby, their acts are not binding on the town or third persons. They have no power to give away the funds of the town, or appropriate them to purposes not warranted by the charter. They must faithfully apply the corporate property to the uses and objects specified in the charter. As they cannot directly dispose of it by way of gratuity, so they cannot accomplish the same result by device or indiscretion. They cannot, under color of a sale, transfer the property of the corporation without consideration; nor can they, under the pretense of satisfaction, discharge a debt due the corporation without payment. * * *

In the case of *Agnew v. Brall*, 124 Ill 312, the Supreme Court has said (p. 314):

"* * * They (the City Council) have no power to squander or give away the funds or property of the incorporation but all property within their control, belonging to the incorporation, must be honestly applied to the uses and purposes specified in the act of incorporation. The City Council have no power to sell, or in any manner dispose of, the property of the corporation without consideration * * *."

The two decisions of the Supreme Court above cited seem to have been generally recognized by the courts, and both cases are cited in the case of *Chicago v. Pittsburg, Cincinnati, Chicago, and St. Louis Ry.*, 244 Ill 220, where the court says on page 230:

“ * * * Authorities of municipal corporations have no power to make donations to any individual or corporation, but the revenues are to be held for corporate purposes. * * * ”

It plainly appears that Mr. Napatano's injuries did not result from any neglect or misconduct on the part of the City. Also, it is equally plain that the failure of the Industrial Commission to award compensation to claimant is not chargeable to any act or omission on the part of the City and we are of the opinion, therefore, that the City authorities cannot legally use the public funds to compensate him for his injury.

* * * * *

INDUSTRIAL COMMISSION ORDER FOR MEDICAL EXPENSES

(No. 9063—Chairman, Committee on Finance—T.A.M.—February 21, 1936—7 pp.)

The Industrial Commission, acting within its powers, and upon proper proof of liability, has the right to order the City to pay for medical services furnished to City employees who have been injured in the course of their employment. However, after the Commission's order that the City pay certain medical expenses has become final, it cannot then enter another order for additional expenses unless such second order was to correct errors in computation.

Citation: ISBS '35, 48: 208, 216, 218, 219(par. f).

OPINION OF FOREGOING SYNOPSIS

We are in receipt of your letter of January 28, 1936, relative to a claim for hospitalization of Joseph Perri, a City employee at the County hospital, in which you state:

“To the writer's knowledge this is the first time such a claim has been presented or allowed in connection with a city employee injured on duty. As I see it, the allowance of this claim may establish a precedent and result in a considerable expense to the city,”

and you ask that we review the matter and give an opinion thereon.

The Workmen's Compensation act makes it the duty of an employer to furnish necessary medical care and attention to injured employees. Section 8 of this act provides:

"(a) The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure and relieve from the affects of the injury. * * *"—Illinois State Bar Statutes, 1935, chapter 48, section 208.

If an employer fails or refuses to furnish such medical care as is necessary, the employee may institute proceedings before the Industrial Commission to compel the furnishing thereof, or the payment therefor, and the Industrial Commission in a proper proceeding, has jurisdiction to order the employer to provide medical care, or to pay for care already received, upon proof of liability of the employee for such services. Section 18 of the Workmen's Compensation act provides:

"All questions arising under this Act, if not settled by the parties interested therein, shall, except as otherwise provided, be determined by the Industrial Board."—Illinois State Bar Statutes, 1935, chapter 48, section 218.

It is, therefore, our opinion that the Industrial Commission, acting within its powers, and upon proper proof of liability, has the right to order the payment of bills for medical services furnished employees injured in the course of employment, by the employer.

It is our opinion, further, that the order entered December 20, 1935, in the matter of Joseph Perri, is not a proper order against the city of Chicago, and that there is no liability on the part of the city of Chicago to pay the amount therein fixed as being a reasonable charge for hospital services furnished by the Cook County hospital, for the following reasons:

Joseph Perri filed an application for arbitration with the Industrial Commission December 5, 1934, in which it was alleged he sustained an accidental injury June 8, 1934, while working as a laborer, for which he claimed "\$400.00 account medical care and attention" and "\$15.00 per week for complete and permanent disability, including pension provided for under paragraph (f) of section 8" and that "the employer denies liability for the compensation provided for in the Workmen's Compensation act."

Hearing was had June 14, 1935, before an arbitrator designated by the Industrial Commission, at which the city of Chicago was represented by counsel.

In his award, entered August 11, 1935, the arbitrator found that the petitioner did sustain an accidental injury, which did arise out of and in the course of his employment, and that he was "wholly and permanently incapable of work," and awarded compensation at the rate of \$20.00 per week for a period of two hundred seventy-five weeks, and thereafter a pension of \$36.66 per month during life, and the "further sum of \$225.00 for

necessary first aid, surgical and hospital services, as provided in paragraph (a) of said section 8."

The basis for the finding of liability for medical and hospital services, was the testimony of the petitioner that he was taken to the office of the "city doctor" and from there to Mother Cabrini hospital, where he remained about three weeks, during which period he was treated by Dr. E. J. Chesrow, who testified he had treated the petitioner about three weeks in the hospital and afterwards in his home about twenty-five times, and that the usual, customary, and reasonable charge for the hospital services he received was \$5.00 per day; that his charge for the treatment was \$50.00 while in the hospital and \$75.00 for treatment at home; that these charges were reasonable, usual, and customary for such services. No other evidence with reference to medical or hospital treatment or services was adduced, except the testimony of the petitioner that after he went home from Mother Cabrini hospital he was taken to the Cook County hospital. The record does not show by whom he was taken, or when, or why. It would, therefore, appear that the arbitrator calculated twenty days' hospital service at Mother Cabrini hospital at \$5.00 per day and \$125.00 medical, a total of \$225.00.

The city of Chicago filed and perfected a petition for review of the award by the Industrial Commission, under the provisions of section 19 of the Workmen's Compensation act, and a hearing was held thereon, November 5, 1935. The Commission on that date took the case on record made before the arbitrator, and additional evidence submitted, and on November 12, 1935, entered its decision, in which it approved and affirmed the award of the arbitrator, and ordered it to stand as its decision. No appeal was taken from this decision, and it became and is final, and the City is liable for the payment of compensation and medical attention in accordance with the terms of the award and nothing more.

The records of the Industrial Commission show that on June 17, 1935, three days after the hearing before the arbitrator, a document on the letterhead of the "Cook County Bureau of Public Welfare," bearing the caption "Petition to have fee fixed as provided in section 16 of the Workmen's Compensation act" was filed. A copy thereof is attached hereto. Section 16 of the Workmen's Compensation act, in part, provides:

"* * * The board shall have power to determine the reasonableness and fix the amount of any fee or compensation charged by any person, including attorneys, physicians, surgeons and hospitals, for any service performed in connection with this Act, or for which payment is to be made under this Act or rendered in securing any right under this act."—Illinois State Bar Statutes, 1935, chapter 48, section 216.

No action was taken upon the petition filed by the Cook County Bureau of Public Welfare until November 22, 1935, when a hearing was had before the Commission, notice of which was given the city of Chicago, by letter, signed A. Johansson, Commissioner. An order, entitled *Joseph*

Perri v. City of Chicago, No. 211016, was entered by the Commission on December 20, 1935, in which it is stated:

"Upon a consideration of the proceedings had upon the hearing of said petition, the Commission is of the opinion that the sum of \$144.00 is a fair and reasonable fee for the hospital services rendered Joseph Perri, the petitioner herein, by said Cook County Bureau of Public Welfare.

It is therefore ordered by the Commission that a fee of one hundred forty-four (\$144.00) dollars be and the same is hereby fixed as a fair and reasonable hospital fee for hospital services rendered said Joseph Perri, the petitioner herein by the said Cook County Bureau of Public Welfare, in connection with above entitled cause."

The decision of the Industrial Commission, entered November 12, 1935, was not reviewed as provided in section 19, paragraph (f) and therefore it became final. Section 19, paragraph (f) provides:

"The decision of the Industrial Commission, acting within its powers, according to the provisions of paragraph (e) of this section shall, in the absence of fraud, be conclusive unless reviewed as in this paragraph hereinafter provided: Provided, however, that the * * * Commission may * * * on its own motion, or on the motion of either party, correct any clerical error or errors in computation within fifteen days after the date of * * * any decision on review of the Commission, and shall have the power to recall the original * * * decision on review, and issue in lieu thereof such corrected * * * decision * * *"—Illinois State Bar Statutes, 1935, chapter 48, section 219, par. (f).

It follows the Industrial Commission was without jurisdiction to enter any order against the city of Chicago after its final decision of November 12, 1933, unless to correct clerical error or errors in computation; obviously the order of December 20, 1935, does neither of these and it does not purport to. It is merely a finding that \$144.00 is a reasonable charge for hospital service received by Joseph Perri in the Cook County hospital.

The petition filed on behalf of the hospital does not name the city of Chicago as a party thereto, except indirectly as the employer, and except for the fact it bears the Industrial Commission number of the Perri case, there is no way of identifying or connecting it with that case.

We are therefore of the opinion that the order of the Industrial Commission, fixing the sum of \$144.00 as being a reasonable fee for services rendered Joseph Perri in the Cook County hospital, imposes no legal obligation upon the city of Chicago to pay that sum to the Cook County hospital.

APPLICABILITY OF WORKMEN'S COMPENSATION ACT WHEN CITY SUBCONTRACTOR

(No. 9036—*Superintendent of Highways—J.J.S.—February 5, 1936—2 pp.*)

City employees working under City direction when the City is a subcontractor are protected by the Workmen's Compensation act.

WORKMEN'S COMPENSATION FOR TEMPORARY RELIEF EMPLOYEES

(No. 9514—*Commissioner of Relief—C.N.—May 3, 1937—2 pp.*)

By statute, persons on relief who are employed temporarily in the work of maintaining and repairing the buildings used by the Chicago Relief Administration are protected by the Workmen's Compensation act.

Citation: ISBS '35, 48: 202.

OPINION OF FOREGOING SYNOPSIS

We have your letter of April 28, 1937, in which you say that you are confronted with a problem because of your desire to have certain temporary employees protected under the Workmen's Compensation act. You explain that in addition to your temporary civil service employees considered as regular personnel, it is necessary for you in the operation of the relief administration to engage certain temporary help usually at an hourly rate. In some instances these workers are assigned from relief rolls, but it is also necessary from time to time to engage skilled tradesmen such as plumbers, steamfitters, etc., many of whom because of union affiliations are paid high wages, for short periods of time. This class is used for maintenance and repair of the buildings used by the Chicago Relief Administration and the expenses entailed are charged to relief and not to administrative costs.

Section 3, paragraph 202, chapter 48 (page 1590) Illinois State Bar Statutes, 1935, reads in part as follows:

"Applies automatically. The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic

or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely:

1. The erection, maintaining, removing, remodeling, altering or demolishing of any structure, except as provided in sub-paragraph 8 of this section.

2. Construction, excavating or electrical work, except as provided in sub-paragraph 8 of this section. * * *

The exceptions in sub-paragraph 8 referred to do not include the character of enterprises involved in your inquiry.

It is clear that under the portion of the statute hereinabove quoted the persons on relief who are engaged temporarily in the work of maintaining and repairing the buildings used by the Chicago Relief Administration are, while they are so employed, covered by the Workmen's Compensation act.

LIABILITY FOR INJURIES TO RELIEF CLIENTS REPAIRING HOUSES AND FLAT BUILDINGS

*(No. 9560—Commissioner of Relief—T.A.M.—July 15, 1937—
3 pp.)*

Building tradesmen employed directly by the Chicago Relief Administration to repair houses and flat buildings under a work relief plan whereby the cost of repairs will be credited to the Chicago Relief Administration in the form of free rent for relief tenants, would be employees of the City, and the City would be liable to pay compensation in accordance with the provisions of the Workmen's Compensation act for all accidental injuries arising out of the employment of those building tradesmen.

If the plan does not contemplate direct employment of the building tradesmen by the Relief Administration, but contemplates the letting of contracts for the performance of the work, the workmen would not be employees of the City, and there would be no liability on the part of the City for injuries to the workmen arising out of the project.

POLICEMAN INJURED ON DUTY

(No. 9554—*Commissioner of Police—G.F.M.—July 8, 1937—*
2½ pp.)

When through a misunderstanding of the facts a policeman was entered in the records of the Police department as "sick on duty" instead of "injured on duty", the records should be corrected to read "injured on duty", and the medical and hospital expenses of the policeman, who was injured in the course of his duties, should be paid by the City.

Citation: Coun. J. (1930-31), p. 3573.

CHAPTER XIV

ANNUITIES AND BENEFITS OF CITY EMPLOYEES

A. FIREMEN'S ANNUITY AND BENEFIT FUND

PARTICIPATION OF EMPLOYEE IN UNIFORM SERVICE IN FIREMEN'S ANNUITY FUND

(No. 9018—*Retirement Board, Firemen's Annuity and Benefit Fund—G.F.M.—January 16, 1936—3 pp.*)

It does not appear that any provision has been made in the Firemen's Annuity and Benefit Fund act for the inclusion in that fund of a person holding the position of "foreman of electrical mechanics" notwithstanding that position was included by ordinance in the "uniformed service" of the Fire department. Therefore, a person holding that position may not become a participant in, or contributor to, the Firemen's Annuity and Benefit Fund.

Citations:

Statute: Firemen's Annuity and Benefit Fund act, sec. 1, 12.

Ordinances: Code '31: 336.

Coun. J. (1935-36), p. 468.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of Cyrus G. Talbot, the following is submitted:

On Tuesday, July 16, 1935, there was presented to the City Council of the city of Chicago an ordinance amending section 336 of article VI of the Revised Chicago Code of 1931, as amended, so as to include "one foreman of electrical mechanics" in the uniformed service of the Fire department. (*Pamphlet No. 6*, July 16, 1935, at page 13). At the meeting of the City Council, held on Monday, July 22, 1935, the printed record of the proceedings of the meeting held on Tuesday, July 16, 1935, was approved. (*Journal of Proceedings of City Council*, July 22, 1935, page 383). At the same meeting, viz., July 22, the ordinance for the inclusion

of one foreman of electric mechanics within the "uniformed service" of the Fire department, deferred and published July 16, 1935, was passed, said ordinance to be in force and effect from and after its passage. (*Journal of Proceedings of City Council*, July 22, 1935, page 468).

Section 1 of the act governing your fund provides for the creation of the fund "for the benefit of firemen employed by such city, and of the widows, children and parents of such firemen and of all contributors to, participants in, and beneficiaries of any firemen's pension fund in operation, by authority of law, in such city at the time this act shall come in force and effect in such city."

Section 12 of the act defines a fireman as follows:

"Any person who was, is, or shall be employed by such city in the fire service thereof as a fireman, fire engineer, marine engineer, or fire pilot, and whose duty is to participate in the work of controlling and extinguishing fire at the location of any such fire, whether such person shall be assigned to duty within such fire service other than the actual extinguishing of fire or not; also any person employed in the fire service of such city on the date upon which this Act shall come in force and effect therein, whose duty shall not be as hereinbefore stated but who shall then be a contributor to, participant in, or beneficiary of any firemen's pension fund in operation, by authority of law, in such city on said date, unless any such latter described person shall apply to the retirement board, within ninety (90) days from and after the date upon which this Act shall come in force and effect in such city, for exemption from the provisions of this Act."

It does not appear that any provision is made in your act for the inclusion in your fund of a person holding the position of "foreman of electrical mechanics" nor of any person by reason solely of the fact that he is included by ordinance in the "uniformed service" of the Fire department.

It would appear from the letter of Mr. Talbot that he has heretofore been a contributor to the Municipal Employees' Annuity and Benefit fund of Chicago and requests that his accrued rights in that fund be transferred to your fund. There does not appear to be any way in which this can be done under the facts of Mr. Talbot's service as shown in the records, it appearing that Mr. Talbot has at all times been a municipal employee and not a fireman, until the act of the City Council included him in the uniformed service of the Fire department. This inclusion, of itself, does not make Mr. Talbot a "fireman" within the definition contained in your act, nor does it give him any right to participate in or to contribute to your fund.

Unless Mr. Talbot is a fire engineer, a marine engineer, a fire pilot, or a fireman whose duty it is to participate in the work of controlling and extinguishing a fire at the location of any such fire, or a person who was a contributor to, participant in, or beneficiary of the former Firemen's Pension fund, I am of the opinion that the law does not permit him to become a participant in or contributor to your fund.

INJURY RECEIVED WHILE PERFORMING ACT OF DUTY

(No. 9192—*Retirement Board, Firemen's Annuity and Benefit Fund—G.F.M.—June 4, 1936—3 pp.*)

A fire alarm telegraph repairer, whose foot was injured by the falling of a manhole cover while he was repairing an underground fire alarm line conduit, was injured in the performance of an act of duty, and, as he was a "fireman" at the time of the injury, he is entitled to a duty disability benefit.

Citations:

Statutes: Firemen's Annuity and Benefit Fund act, sec. 12, 46.

Ordinance: Code '31: 454.

PARENTS' ANNUITY

(No. 9309—*Retirement Board, Firemen's Annuity and Benefit Fund—October 14, 1936—G.F.M.—2 pp.*)

A parents' annuity is to be paid to the natural parent or parents of any fireman who shall die on or after July 1, 1931, while receiving an annuity granted after twenty years of service, provided that he has left no widow or unmarried child under eighteen years of age, and provided that satisfactory proof be made to the Retirement Board that the fireman was regularly contributing to the support of his parent or parents a sum equal to twenty-five dollars a month for a period of not less than three months prior to his death.

Citation: Firemen's Annuity and Benefit Fund act, sec. 45.

REFUND OF SALARY DEDUCTIONS TO WIFE OF MISSING FORMER FIREMAN

(No. 9538—*Retirement Board, Firemen's Annuity and Benefit Fund—G.F.M.—June 8, 1937—2 pp.*)

The Retirement Board of the Firemen's Annuity and Benefit fund may lawfully refund to the wife of a former member of

the fire service salary deductions due and payable to her husband, who is missing, for the support of her minor child.

Citation: ISBS '35, 24: 941-59.

PENSION SERVICE CREDIT FOR PERIOD OF SEPARATION

(No. 9013—*Retirement Board, Firemen's Annuity and Benefit Fund—G.F.M.—January 14, 1936—2 pp.*)

In the absence of any finding in a court order directing the reinstatement of a discharged fireman that the discharge was unlawful, and in the absence of any order to the Board of Trustees of the Firemen's Pension Fund to credit the period of the employee's separation as a period of service, the employee is not entitled to be credited with the years of his separation from the City's employ as a period of service.

The word "service" as used in the former pension fund acts means "actual service", and contributions to a pension fund are a prerequisite for any credit for service.

Citation: *Carpenter v. Chicago*, 199 Ill App 558 (1917).

Opinion No. 9001 (2½ pp.) of January 7, 1936, to the Retirement Board of the Firemen's Annuity and Benefit fund holds substantially the same as the above opinion.

CHILD'S ANNUITY FOR ADOPTED CHILD—ANNUITY PAID AS RESULT OF MISREPRESENTATION

(No. 9539—*Retirement Board, Firemen's Annuity and Benefit Fund—G.F.M.—June 8, 1937—2½ pp.*)

An annuity cannot be paid for the benefit of an adopted child, and any money which may have been so paid as a result of misrepresentation, fraud, or error can be recovered from the person to whom it was paid by withholding all or any portion of future annuities payable to that person until the full amount paid as a result of misrepresentation, fraud, or error has been recouped.

Citation: ISBS '35, 24: 941-944.

WITHHOLDING OF PENSION CHECK FOR SERVICE OF PROCESS UPON PENSIONER

(No. 9529—Retirement Board, Firemen's Annuity and Benefit Fund—G.F.M.—June 3, 1937—2 pp.)

The Retirement Board of the Firemen's Annuity and Benefit fund has no power to withhold a pension check merely for the purpose of having the pensioner call in person at the office of the Retirement Board so that he may be seized or served with process by some local court.

Citation: ISBS '35, 24: 941-946.

B. MUNICIPAL COURT AND LAW DEPARTMENT EMPLOYEES' ANNUITY AND BENEFIT FUND

OATH OF OFFICE BY RETIREMENT BOARD OF MUNICIPAL COURT AND LAW DEPARTMENT

(No. 9344—Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G.F.M.—November 24, 1936—2 pp.)

Employees elected members of the Retirement Board of the Municipal Court and Law Department Employees' Annuity and Benefit fund are obliged to take an oath of office, but the Bailiff and the Clerk of the Municipal Court are members of the Board by virtue of the statute creating the fund and need not take such an oath.

Citation: Municipal Court and Law Department Employees' Annuity and Benefit Fund act, sec. 2.

**MUNICIPAL COURT TELEPHONE OPERATORS' RIGHT TO
PARTICIPATE IN MUNICIPAL COURT AND LAW
DEPARTMENT EMPLOYEES' ANNUITY
AND BENEFIT FUND**

(No. 9019—*Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G.F.M.—January 30, 1936—2 pp.*)

The telephone operators of the Municipal court, being appointed by the bailiff of the Municipal court and paid out of appropriations made to the bailiff's office for expenses and maintenance, are persons "employed in the service of the Municipal court" and are entitled to participate in the Municipal Court and Law Department Employees' Annuity and Benefit fund, provided they are holding positions which ordinarily require actual performance of duty during not less than ten months in each calendar year, and provided they are not participants in any other annuity and benefit fund in operation in the City.

Citation: ISBS '35, 24: 815(1), 815(12).

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**EMPLOYEE EXEMPT FROM MUNICIPAL COURT AND
LAW DEPARTMENT EMPLOYEES' ANNUITY
AND BENEFIT FUND**

(No. 9705—*Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G.F.M.—November 18, 1937—1½ pp.*)

An employee of the Law department who is a beneficiary of another City annuity and benefit fund is exempt from the Municipal Court and Law Department Employees' Annuity and Benefit Fund act. Any deductions made from the salary of such an employee and paid into the latter fund should be refunded to him.

Citation: IRS '37, 37: 516.

LAW DEPARTMENT EMPLOYEE'S SERVICE CREDIT

(No. 9489—*Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G.F.M.—April 14, 1937—2 pp.*)

If an employee of the Department of Law can establish the fact that on December 31, 1935, he was serving the City as a lawyer of whom actual performance of duty during ten months of each calendar year was required, the periods of time during which such services were rendered prior to January 1, 1936, should be credited as periods of prior service, and any such service rendered subsequent to December 31, 1935, should be credited as service rendered subsequent to that date for purposes of the Municipal Court and Law Department Employees' Annuity and Benefit Fund act.

The character of the service performed for the City, and not the title of the position, determines the right of an employee to credit for service under the Municipal Court and Law Department Employees' Annuity and Benefit fund act, and credit may thus be given for services rendered by a member of the Law department to various committees of the City Council.

Citation: ISBS '35, 24: 815 (48).

ACCOUNTING RECORD OF UNCLAIMED ANNUITY

(No. 9374—*Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G.F.M.—December 15, 1936—1½ pp.*)

When an employee's annuity is fixed, it becomes payable to the employee as soon as he is out of the service. He should be given full information as to his annuity rights and the monthly payments due him should be set up in the Annuity and Benefit fund's books as liabilities awaiting remittance to the employee whenever he shall apply for the annuity.

Citation: ISBS '35, 24: 815(26)d, 815(27)g.

C. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

(1). *Employees Eligible to Membership*

ANNUITY FUND MEMBERSHIP OF CERTAIN FIRE DEPARTMENT EMPLOYEES

(No. 9537—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G.F.M.—June 8, 1937—5 pp.*)

Any employee engaged as a telegraph repairer, assistant telegraph repairer, telegraph repairer in charge, or assistant chief of fire alarm wires prior to the date those positions were classified in the fire service has the right to continue his membership in the Municipal Employees' Annuity and Benefit fund for the reason that the pension rights granted the employee were granted by the legislature in specific legislation, and cannot be taken away merely through reclassification of his position by the Civil Service Commission.

The following method should be used in passing on the pension status of employees in those positions:

1. (a) Any person appointed assistant telegraph repairer or telegraph repairer prior to February 5, 1923, had and has a right to remain in the Municipal Employees' Annuity and Benefit fund and receive the benefits of his credits, or to transfer to the firemen's fund.
 - (b) Any person appointed telegraph repairer or assistant telegraph repairer on or after February 5, 1923, and prior to July 1, 1931, is automatically in the Firemen's Pension fund.
 - (c) Any person appointed assistant telegraph repairer or telegraph repairer on or after July 1, 1931, is automatically a member of the Municipal Employees' Annuity and Benefit fund.
2. Any person appointed to the position of telegraph repairer in charge is automatically a member of the Mu-

nicipal Employees' Annuity and Benefit fund unless at the time of his appointment he was a member of the firemen's fund, or entitled to be such a member by reason of his preceding position in the municipal service, if any.

3. (a) Any person appointed to the position of assistant chief of fire alarm wires prior to September 11, 1925, was automatically a member of the Municipal Employees' Annuity and Benefit fund and remained a member of that fund unless he elected or elects to be a member of the firemen's fund.
- (b) Any person appointed assistant chief of fire alarm wires subsequent to September 11, 1925, and prior to July 1, 1931, who was not at the time of his appointment a member of the Municipal Employees' Annuity and Benefit fund automatically became a member of the firemen's fund.
- (c) Any person appointed to the position of assistant chief of fire alarm wires on or after July 1, 1931, automatically became a member of the Municipal Employees' Annuity and Benefit fund unless at the time of his appointment he was a member of the Firemen's Pension fund, or entitled to be such a member.

The salary deductions of any of the employees in these positions which should have been paid into the Firemen's Pension fund, but were paid into the Municipal Employees' Annuity and Benefit fund, should be transferred to the Firemen's Annuity and Benefit fund, and an adjustment made by the Retirement Board of that fund with the employee concerned as to the financial phase of his membership in that fund.

Citation:

Statute: Ill. Laws (1917) p. 266.

Case: Stiles v. Board of Trustees, 281 Ill 636 (1918).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to the pension status of certain employees classified in the fire service, the following is submitted.

Your inquiry relates to the pension status of telegraph repairers, assistant telegraph repairers, telegraph repairers in charge, and assistant

chief of fire alarm wires. All the employees in these classifications were originally members of the Municipal Employees' pension fund and later of the Municipal Employees' Annuity and Benefit fund. Through reclassification by the Civil Service Commission, these positions were placed in the fire service on the following dates:

Telegraph repairers	2/ 5/23
Assistant telegraph repairers.....	2/ 5/23
Telegraph repairers in charge.....	6/21/34
Assistant chief of fire alarm wires.....	9/11/25

Any employee engaged in any one of the above classifications prior to the date on which such position was classified in the fire service has the right to continue his membership in your fund for the reason that the pension rights granted to such employee were granted by the legislature in specific legislation, and could not be taken away from him merely through reclassification of his position by the Civil Service Commission. The act governing the Civil Service Commission is entirely separate and distinct from the acts governing the pension funds and the Civil Service Commission has no connection with or control over established pension rights. (*Stiles v. Board of Trustees*, 281 Ill 636, 641).

The Firemen's Pension Fund act of 1917 provided in section 13 thereof that "all persons who have been or shall be hereafter appointed to any position which is classified by the Civil Service Commission of such city in the fire service of such city * * * shall be included within the meaning of the word or terms 'fireman' or 'firemen' as used in this act." (Ill. Laws, 1917, p. 266). As a result of this provision of the Firemen's Pension Fund act, all persons appointed to a position classified in the fire service by the Civil Service Commission while this act was in operation, automatically became members of the Firemen's Pension fund if they were appointed to such position after the position had been so classified. On July 1, 1931, the Firemen's Annuity and Benefit Fund act came in force in Chicago, the definition of "fireman" was changed, and persons appointed to any one of the stated positions here considered on or subsequent to July 1, 1931, became members of your fund exclusively and have no right in the Firemen's Annuity and Benefit fund.

Where the position in the municipal service was classified in the fire service by the Civil Service Commission subsequent to the time of an employee's appointment, such classification gave to such employee the privilege of electing to become a contributor to the Firemen's Pension fund, but did not of itself effect the transfer of such employee from your fund to the firemen's fund. To hold otherwise would be to deprive an employee contributor to your fund of all his rights and benefits which had accumulated in your fund during his years of service, since there was no provision in either your act or the firemen's act for the transfer of credits.

Your records show that some assistant telegraph repairers and telegraph repairers have been contributors to your fund since 1906, and when those two positions were classified in the fire service in 1923, a compulsory transfer of those employees to the firemen's fund would have meant the

loss of seventeen years of credit for service rendered by those employees. The same situation exists in the case of telegraph repairers in charge who were classified in the fire service in June, 1934, several of whom had established rights in your fund which would have been lost to them had such reclassification compelled their transfer to the firemen's fund.

In view of the above, I am of the opinion that the following method should be used in passing on the pension status of the employees referred to:

1. (a) Any person appointed assistant telegraph repairer or telegraph repairer prior to February 5, 1923, had and has a right to remain in your fund and receive the benefits of his credits, or to transfer to the firemen's fund.
- (b) Any person appointed to the position of telegraph repairer or assistant telegraph repairer on or after February 5, 1923, and prior to July 1, 1931, is automatically in the firemen's pension fund.
- (c) Any person appointed assistant telegraph repairer or telegraph repairer on or after July 1, 1931, is automatically a member of your fund.
2. Any person appointed to the position of telegraph repairer in charge is automatically a member of your fund unless at the time of such appointment he was a member of the firemen's fund, or entitled to be such member by reason of his preceding position in the municipal service, if any.
3. (a) Any person appointed to the position of assistant chief of fire alarm wires prior to September 11, 1925, was automatically a member of your fund and remained a member of your fund unless he elected or elects to be a member of the firemen's fund.
- (b) Any person appointed assistant chief of fire alarm wires subsequent to September 11, 1925, and prior to July 1, 1931, who was not at the time of such appointment a member of your fund automatically became a member of the firemen's fund.
- (c) Any person appointed to the position of assistant chief fire alarm wires on or after July 1, 1931, automatically became a member of your fund unless at the time of such appointment he was a member of the firemen's pension fund, or entitled to be such member.

I am further of the opinion that the salary deductions of any of the above employees whose salary deductions should have been paid into the Firemen's Pension fund but were actually paid into your fund, should be transferred by you to the Firemen's Annuity and Benefit fund and an adjustment made by the Retirement Board of that fund with the employee concerned as to the financial phase of his membership in the latter fund.

Opinion No. 9390 (5 pp.) of January 12, 1937, to the Retirement Board of the Municipal Employees' Annuity and Benefit fund holds substantially the same as the above opinion.

ELIGIBILITY OF HOUSE OF CORRECTION GUARDS TO MEMBERSHIP IN MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND

(No. 9462—*House of Correction—G.F.M.—March 22, 1937—*
1½ pp.)

Guards at the House of Correction not eligible to membership in the House of Correction pension fund or any other City pension fund are eligible to membership in the Municipal Employees' Annuity and Benefit fund, if they are civil service employees.

Citation: ISBS '35, 24: 749.

SALARY DEDUCTIONS WRONGLY PAID INTO MUNICI- PAL EMPLOYEES' ANNUITY AND BENEFIT FUND BY POLICE MESSENGER

(No. 9183—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G.F.M.—May 25, 1936—3 pp.*)

Salary deductions for pension or ordinary disability benefit purposes of a police messenger or messenger and supply carrier which were wrongly paid into the Municipal Employees' Annuity and Benefit fund should be transferred with interest accumulations to the Policemen's Annuity and Benefit fund, except that deductions made for administrative expenses should be retained.

Citations:

Case: *People v. Foreman*, 296 Ill 487 (1921).

Statute: ISBS '35, 24: 827-838.

(2). *Annuities and Disability Benefits*

CORRECTION OF AGE RECORD FOR ANNUITY FUND³⁴

(No. 9457—*Municipal Employees' Annuity and Benefit Fund—G.F.M.—March 16, 1937—1½ pp.*)

The Retirement Board of the Municipal Employees' Annuity

³⁴ Compare Opinion No. 9039, p. 443, which deals with a like problem under a different statute.

and Benefit fund has no power under the act governing the fund to make any change on its records of the age of a municipal employee different from the age stated in his application for civil service appointment. The only power the Board has is to make an award according to the employee's actual age when application is made for an award, but until that time the age stated in his application must remain on the Fund's records as his official or recorded age.

Citation:

Statutes: ISBS '35, 24: 798.

CALCULATION OF ANNUAL SALARY FOR ANNUITY ON BASIS OF MONTHLY SALARY

(No. 9615—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G.F.M.—September 13, 1937—3 pp.)

In determining the maximum annuity which may be received by an employee whose salary is fixed on a monthly basis, the annual salary of the employee by statute is twelve times the monthly salary no matter how many months the employee may work, except that no amount of salary in excess of \$250.00 for service rendered in any one month shall be considered for any purpose.

Citation: IRS '37, 24: 1083.

SALARY BASE FOR ENGINEER CUSTODIAN'S ANNUITY

(No. 9697—Retirement Board, Municipal Employees' Annuity and Benefit Fund—G.F.M.—November 9, 1937—2½ pp.)

The amount appropriated for an engineer custodian by the Board of Education must be taken as the amount of compensation for the calculation of his annuity regardless of the fact that he may have paid out some of the money appropriated for him for janitorial help. The maximum amount of salary for annuity purposes, however, may not exceed \$3,000.

Citation: IRS '37, 24: 1055, 1100.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion concerning the salaries of school engineer custodians, the following is submitted:

Your letter states that prior to the year 1927 the annual appropriation bills for the Board of Education of Chicago, set up the salaries for engineer custodians in an amount which was intended to be sufficient to allow the engineer custodian to pay out of his own salary any necessary janitorial help in the school over which he had charge; that section 57 of the act governing your fund, as amended, provides additional annuity in certain cases, which additional annuity is based on the actual compensation as defined in section 12 of the act. Your question is as to whether the full amount so appropriated for engineer custodians prior to the year 1927 is to be considered the actual compensation of these employees for the purpose of computing annuity under the provisions of section 57.

Section 12 of your act defines actual compensation as "the actual sum appropriated by the City Council or Board of Education of such city * * * for services in any position in the service held by a municipal employee, free from the limitation stated in the foregoing definition of 'salary'" (Illinois Revised Statutes, 1937, chap. 24, sec. 1055). The definition of salary in section 12 limits the maximum amount of salary to be considered for any purposes of the act at \$3,000.

As your act defines actual compensation as "the actual sum appropriated," such sum so appropriated must be taken as the actual compensation. The mere fact that the engineer custodian may have paid out some of his moneys for janitorial help cannot be considered, as your act makes no reference to what may be done with the money appropriated as salaries.

I am of the opinion that in making computations under section 57 of your act (Illinois Revised Statutes, chap. 24, sec. 1100), based on actual compensation, the amount appropriated for any engineer custodians by the Board of Education must be taken as the amount to be used as the basis of such computations.

SALARY TO BE USED IN COMPUTING PRIOR SERVICE AND WIDOW'S PRIOR SERVICE ANNUITIES

(No. 9448—Retirement Board, *Municipal Employees' Annuity and Benefit Fund*—G.F.M.—March 8, 1937—2½ pp.)

The salary of a member of the Health department to be used in computing his prior service and widow's prior service annuities for services rendered prior to January 1, 1922, is the salary he was receiving as a member of the Health department on January

1, 1922, and not any assumed salary of a position for which he was eligible under civil service but which he was not at that time occupying and from which he was not receiving a salary.

Citation: ISBS '35, 24: 749, 751, 756.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of William B. Thomas, the following is submitted:

Your letter states that on January 1, 1922, William B. Thomas was employed in the Health department of the city of Chicago as a junior clerk; that on the same date his name also appeared on an eligible civil service list as an electrical construction and conduit inspector. Your inquiry is as to whether the salary of Mr. Thomas in the position of civil service junior clerk or the salary of Mr. Thomas as civil service electric construction and conduit inspector shall govern for the purpose of computing the accumulation for prior service and widow's prior service annuity purposes for services rendered prior to January 1, 1922.

Your records show that Mr. Thomas was in the employ of the City on December 31, 1921, and was therefore a "present employee" within the provision of section 12 of your act. (Illinois State Bar Statutes, 1935, chap. 24, sec. 749). Section 14 of your act provides that for all purposes of your act it shall be assumed that the annual salary of any "present employee" has been in the same amount during the entire period of service rendered by such employee prior to the first day of January, 1922, as it was on said date. (Illinois State Bar Statutes, 1935, chap. 24, sec. 751). Section 19(b) of your act provides that the "present employee" shall be credited in his account of an amount equal to 5¼% of his annual salary as it shall be on the first day of January, 1922, for a period of time equal to that of service rendered by him before January 1, 1922, with interest thereon at the rate of four percent per annum, *et cetera*. (Illinois State Bar Statutes, 1935, chap. 24, sec. 756).

The only "salary" that Mr. Thomas was receiving on January 1, 1922, was the salary he was receiving as a junior clerk in the Health department. He was not receiving any salary as an electrical inspector, and therefore there was no salary of that position available for purposes of computation. The act is very definite on this point, and where an employee was actually in receipt of a salary on January 1, 1922, there is no basis for using the assumed salary of a position for which he was eligible under civil service but which he was not at that time occupying, nor in receipt of a salary therefrom.

I am of the opinion that the salary being received by Mr. Thomas on January 1, 1922, as junior clerk in the Health department is the only salary that can be used in making computations under section 19(b) of your act, or for the assumption authorized under section 14 of your act.

ANNUITY OF PENSION FUND CONTRIBUTOR

(No. 9012—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G.F.M.—January 9, 1936—3 pp.*)

A municipal employee who shall have been a contributor to the Municipal Pension fund created by the act of 1911, and who shall resign or be discharged from the service after the fund of 1911 was merged with the Municipal Employees' Annuity and Benefit fund, if he has completed twenty or more years of service, attained the age of fifty-five years, and has not drawn out of the latter fund any salary deductions paid into that fund since January 1, 1922, is entitled to receive an annuity of fifty dollars a month after his resignation or discharge.

In computing the term of service of any municipal employee whose salary or wages is arranged on an annual or monthly basis for annuity purposes, service during four months in any one calendar year constitutes a year of service under the statute.

Citation: Municipal Employees' Annuity and Benefit Fund act, sec. 40, 51, 57.

SALARY USED IN COMPUTING A DUTY DISABILITY BENEFIT

(No. 9449—*Retirement Board, Municipal Employees' Annuity and Benefit Fund—G.F.M.—March 8, 1937—2½ pp.*)

A participant in the Municipal Employees' Annuity and Benefit fund injured after July 1, 1931, is entitled to a duty disability benefit based on the salary attached to the position on July 1, 1931, or the salary attached to that position at the time of his injury, whichever of the two salaries is the higher, provided that the maximum salary used is not over \$3000 a year and provided the injury was incurred in the performance of an act of duty. The basis of computation is the salary attached to the position irrespective of the actual amount received by the employee.

Citations:

Statute: ISBS '35, 24: 794(1).

Other references: 18 Op. Corp. Coun. 254 (No. 8701), 273 (No. 8707), 274 (No. 8710), 275 (No. 8709).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of Michael J. Frain, the following is submitted.

Your letter states that Michael J. Frain, motor truck driver, city of Chicago, has been and is now receiving duty disability benefit; that on July 1, 1931, he was a motor truck driver in the street department, receiving a salary of \$8 per day, which equals \$200 a month under the provisions of the act governing your fund; that on the date on which he became disabled in the year 1933, he was receiving a basic salary of \$192 a month, less a reduction of a certain number of days as provided in the annual appropriation bill; that in the year 1931 motor truck drivers in the Street department received \$8 per day, whereas motor truck drivers in some other departments received various scales of pay; that you have been paying Mr. Frain duty disability benefit based on a salary of \$200 per month; and that the question presented for opinion is as to whether or not his duty disability benefit was properly based on his salary of \$200 a month or should have been based on a salary of \$192 a month.

By an act approved October 4, 1932, which was prior to the date of Mr. Frain's injury, the act governing your fund was amended by the adoption of a new section, known as section 57½. [Illinois State Bar Statutes, 1935, chap. 24, sec. 794 (1)]. This new section provided, among other things, that for the purpose of computing duty disability benefit under your act, from and after July 1, 1931, where the disability resulted from injury on or after July 1, 1931, the salary to be used for such computation should be assumed to be not less than the same amount (not in excess of \$3,000) that such salary was on July 1, 1931. This provision has heretofore been construed as meaning that the duty disability benefit is to be computed on the basis of the salary attached to the position held by the employee at the time of his injury, or on the basis of the salary attached to that position on July 1, 1931, whichever is the higher. [18 *Op. Corp. Coun.* 254 (No. 8701); 273 (No. 8707); 274 (No. 8710); 275 (No. 8709)]. The salary to be used in making computation of duty disability benefit is the salary which was attached to the position which the employee held at the time of his injury irrespective of what salary the employee himself may have been receiving on July 1, 1931. It is the position and not the employee which determines what salary is to be used for purposes of computation.

If Mr. Frain was a motor truck driver in the Street department at the time he received his injury, the salary to be used as the basis of computation is the salary attached to that particular position at the date of his injury if such salary was not less than \$200 a month; in the later event, \$200 is to be used for computation.

ANNUITY FOR EMPLOYEE STILL DISABLED AFTER ORDINARY DISABILITY BENEFIT PERIOD HAS EXPIRED

(No. 9288—*Assistant Commissioner of Streets and Electricity*
—G.F.M.—September 18, 1936—2 pp.)

A municipal employee in the Municipal Employee's Annuity and Benefit fund whose ordinary disability benefit period has expired and who still remains disabled, may resign and be paid an annuity from the date of his resignation of such an amount as can be provided from the sum for annuity purposes to his credit at the date of his resignation.

The conservator of a mentally-ill employee has the power to take such steps as may be necessary to secure and conserve the employee's annuity, as the right to it is a personal estate.

Citations: Municipal Employees' Annuity and Benefit Fund act, sec. 49.
ISBS '35, 86: 5.

DEDUCTION OF WORKMEN'S COMPENSATION PAYMENTS

(No. 9254—*Retirement Board, Municipal Employees' Annuity and Benefit Fund*—G.F.M.—August 5, 1936—3½ pp.)

When the basis of a disability for which the Municipal Employees' Annuity and Benefit fund is paying an ordinary disability benefit is not the same as that underlying the disability or loss for which the employee is being paid under the Workmen's Compensation act, the amount of the compensation payments should not be deducted from the benefit payments.

Citations: Municipal Employees' Annuity and Benefit Fund act, sec. 48.
Workmen's Compensation act, sec. 5.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of Michael Morrasch, the following is submitted:

Your letter states that Michael Morrasch, bridge and structural iron worker for the city of Chicago, was injured August 26, 1935, in an

explosion at the Dever crib; that he applied for duty disability benefit and the same was granted and paid until January 31, 1936; that on February 1, 1936, your board took Mr. Morrasch off the duty disability benefit roll and placed him on the ordinary disability benefit roll, your medical examiner having advised you that Mr. Morrasch was then suffering from a disablement not the result of the injury incurred in the performance of an act of duty on August 26, 1935; that Mr. Morrasch received a substantial award under the Workmen's Compensation act because of the injury which he had sustained on August 26, 1936; that you have been deducting from the ordinary disability benefit payable to Mr. Morrasch the amount which he receives each month from Workmen's Compensation; and that such deduction was made pursuant to the provisions of section 48 of the act governing your fund. Your question is as to whether you are correct in making the deduction referred to.

Section 48 of your act provides, in the third paragraph thereof, that if any municipal employee who shall be disabled shall receive any compensation from the City on account of such disability under and by virtue of the law known as the Workmen's Compensation act, and the disability or injury or loss which forms the basis for any compensation or award or pension or payment for a specific loss is also a condition which renders such municipal employee incapable of performing the duties of his position in the service, his disability benefit from your fund shall be reduced by any amount so received.

Section 5 of the Workmen's Compensation act provides that persons entitled to both disability benefit and compensation under the latter act shall receive only so much of said disability benefit as is in excess of the amount of compensation recovered and received if such disability arises out of or in the course of his employment. It will be noted that in both section 48 and in the Workmen's Compensation act the provision for reduction of the disability benefit because of the payment of workmen's compensation is restricted to cases where the compensation and the disability benefit are both being paid because of the same injury, that is where the injury which is the basis of the compensation creates a condition which renders the municipal employee incapable of performing the duties of his position in the service.

An inspection of your files and records in the case of Mr. Morrasch shows that the injury for which he is now being paid under the Workmen's Compensation act consisted of third degree burns of face, neck, ears, both hands and wrists, and both legs received by him on August 26, 1935, as the result of an explosion at the Dever crib; that he was granted duty disability benefit by your board based on these injuries; that on January 24, 1936, your medical examiner reported, as the result of an examination made of Mr. Morrasch by him, that Mr. Morrasch is "disabled now solely because of hardening of the arteries, high blood pressure, bronchitis and heart disease"; that on February 1, 1936, your board suspended further payment of duty disability benefit and granted Mr. Morrasch ordinary disability benefit. It is quite clear that the disability which now prevents him from performing the duties of his position in the service is due entirely to a systemic disorder and not to the injuries received by him on August 26, 1935.

As the basis of the disability for which you are paying ordinary disability benefit to Mr. Morrasch is not the same as underlies the disability, injury, or loss for which he is being paid under the Workmen's Compensation act, I am of the opinion that the amount of such compensation payments should not have been, and should not now be deducted from the ordinary disability benefit payments granted to him by your board.

D. POLICEMEN'S ANNUITY AND BENEFIT FUND

(1). *Rights to Pensions and Benefits*

CORRECTION OF AGE RECORD FOR ANNUITY FUND³⁵

(No. 9039—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—February 4, 1936—1½ pp.*)

Under the Policemen's Annuity and Benefit Fund act the age stated in a policeman's civil service application, a birth certificate, or other evidence satisfactory to the Retirement Board of the Policemen's Annuity and Benefit fund, in the absence of fraud, shall be conclusive evidence of his age. If his age is wrong on the records of the Fund, the Retirement Board may correct the records, if it is satisfied as to the facts.

Citation: Policemen's Annuity and Benefit Fund act, sec. 59.

SALARY DEDUCTIONS IN MANDAMUS

(No. 9138—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—April 29, 1936—1½ pp.*)

Salaries of members of the Police department which are payable by virtue of a writ of mandamus are subject to deductions for the Policemen's Annuity and Benefit fund.

Citation: ISBS '35, 24: 852 et seq.

³⁵ Compare Opinion No. 9457, p. 435, which deals with a like problem under a different statute.

PENSION PAYMENTS TO PRESENT EMPLOYEE

(No. 9038—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—February 4, 1936—2 pp.*)

A person is not entitled to be paid a pension during any time he is employed by the City nor is he entitled, after leaving the City's service, to be paid the amount of the pension withheld from him while in the City's service when he has executed a waiver as required by City ordinances.³⁶

Citations:

Case: *People ex rel. Luthardt v. Retirement Board of Policemen's Annuity and Benefit Fund* 273 Ill App 387 (1934).

Other reference: Council order, Coun. J. (1931-32), p. 349.

Opinion No. 9698 (1½ pp.) of November 9, 1937, to the Retirement Board of the Policemen's Annuity and Benefit fund holds substantially the same as the above opinion.

CONTRIBUTIONS BY POLICEMAN'S WIDOW

(No. 9372—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—December 14, 1936—2½ pp.*)

If a police sergeant who served in the Fire department contributed in full to the Firemen's Pension fund during his period of service in that department, and those contributions were not refunded to him, no money is due the Policemen's Annuity and Benefit fund from his widow for the period of her husband's fire service.

PAYMENT OF SALARY DEDUCTIONS TO FORMER PARTICIPANT'S WIDOW AND CHILDREN

(No. 9037—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—February 4, 1936—2½ pp.*)

When a participant in the Policemen's Annuity and Benefit fund, who has resigned from the Police department, dies without

³⁶ This opinion has been modified by the Illinois Appellate court in *Kelly v. Retirement Board*, 292 Ill App 390 (1937).

applying for a refund of his salary deductions, and his period of service was too short to allow the payment of an annuity to his widow or children, those salary deductions become a part of his personal estate. Where salary deductions are part of an intestate estate, the Retirement Board should pay one-third of those salary deductions to the widow and distribute the remainder equally among the children; or, if the children are minors, the Board may waive guardianship over them and pay the share of each such minor child to the person who is providing or caring for him or her.

Citations: Policemen's Annuity and Benefit Fund act, sec. 38-b, 39(a) 44, 58.
ISBS '35, 39: 1.

PAYMENT OF INCREASED PENSIONS UNDER RECENT AMENDMENT TO 1915 POLICE PENSION FUND ACT

(No. 9612—Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—September 9, 1937—6½ pp.)

The Retirement Board of the Policemen's Annuity and Benefit fund has no legal right to pay the increased pensions to retired policemen provided for in an amendment passed by the last session of the General Assembly to the Police Pension fund act of 1915. The amendment attempts to amend sections 6 and 50 of the Policemen's Annuity and Benefit Fund act of 1921 while specifically declaring itself to be an amendment to sections 3 and 4 of the act of 1915. This violates section 13 of article IV of the State Constitution which regulates the amendment of statutes.

While the Policemen's Annuity and Benefit Fund act of 1921, from which the Retirement Board of the Policemen's Annuity and Benefit fund derives its powers, adopted the provisions of the act of 1915 relative to pensions granted under that act, it adopted those provisions as they existed at the time of making reference to them and does not include subsequent modifications. Consequently the amendment of the last session of the General

Assembly to the act of 1915 is not binding on the Retirement Board.³⁷

Citations:

Constitution: Illinois, art. IV, sec. 13; art. V, sec. 16.

Statutes: Ill. Laws, 1937, p. 300 (Benefits for Retired Annuitants).
IRS '37, 24: 907, 950, 995.
ISBS '35, 24: 841.

Cases: City of Charleston v. Cadle, 166 Ill 487 (1897).
Culver v. People, 161 Ill 89 (1896).
Town of Cicero v. McCarthy, 172 Ill 279 (1898).

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to your legal right to pay increased pensions to retired policemen, the following is submitted.

The records of your office show that application has been made by certain retired policemen for the payment to them of certain increased pensions provided for in a recently enacted legislative enactment known as Senate bill 344.

Senate bill 344 purported to amend sections 3 and 4 of an act entitled

"An act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,"

approved June 29, 1915, as amended. Senate bill 344 was passed by the legislature and presented to the Governor on July 2, 1937. It was neither approved nor vetoed, nor filed by him with his objections in the office of the Secretary of State within ten days after the adjournment of the legislature; it therefore became a law by virtue of the provisions of section 16 of article V of the Constitution of 1870 of the state of Illinois.

This amendment of section 3 of the act of 1915 (Illinois Revised Statutes, 1937, chap. 24, sec. 907) sets out certain proposed increases of pensions to retired policemen. Comparison of this present section 3 with section 3 as it existed before the enactment of Senate bill 344 (Illinois State Bar Statutes, 1935, chap. 24, sec. 841) shows a change from a pension of one-half salary with a maximum limit of \$1100 per annum to any person who retires as captain of police to a flat sum of \$1296 per annum for such person; from a maximum pension of \$1000 to any person who retires as lieutenant of police, to a flat pension of \$1200 to such person; and from a maximum pension of \$900 per annum for all other persons retiring (with a minimum of \$600 to these latter persons), to a flat pension of \$1200 per annum for chief clerks of the detective bureau, \$1140 per annum to sergeants, and \$1000 per annum to patrolmen and police operators.

³⁷ The Cook County Superior Court in *Wagner v. Retirement Board*, No. 37-S-13304, on February 14, 1938, held this amendment constitutional. The case has been appealed to the Illinois Supreme Court.

Section 3, as amended by Senate bill 344, also provides that the increased pensions shall be paid to each person who retired prior to January 1, 1922, and who is now on the police pension roll and shall be paid by your board from the annuity and benefit fund created and maintained by "An Act to provide for the creation, setting apart, maintenance and administration of a policemen's annuity and benefit fund in cities having a population exceeding two hundred thousand inhabitants" approved June 29, 1921, as amended.

There is grave doubt as to the legal right of your board to pay these increased pensions. Your powers and duties are specifically indicated in the act creating your fund. Your power to pay pensions granted under the act of 1915 is set out in paragraph (g) of section 6 of the act governing your fund (Illinois Revised Statutes, 1937, chap. 24, sec. 950) which paragraph grants you power to "authorize the payment of any annuity, pension, or benefit whether such annuity, pension, or benefit was or shall be granted under and by virtue of the provisions of this act, or under and by virtue of the provisions of any other act or acts relating to police pensions, heretofore in force and effect in such city and which have been superseded by this act." It will be noted that your power to authorize the payment of a pension granted under the act of 1915 is specifically limited to a pension granted under "any other act or acts relating to police pensions heretofore in force and effect in such city" and no power is given to your board to authorize payment of a pension under any later amendment to the act of 1915, but only under the act as it was at the time it was "superseded by this act."

When the legislature created the law under which your board operates, there was a complete revision, rewriting, and rearrangement of the subject matter of pensions for policemen, and police pensions were based on an actuarial reserve basis by the revised act. It is a rule of statutory construction that a revision of a subject by later statute evinces legislative intention to substitute its provision for earlier law on the same subject. The legislative intent is further evidenced by the provision contained in section 50 of the act governing your fund (Illinois Revised Statutes, 1937, chap. 24, sec. 995) which states distinctly that "it is the intention of this act that the annuity and benefit fund herein provided for shall on the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city, and thereafter, supersede and take the place of any police pension fund which shall be in operation in such city under and by virtue of an act entitled 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants' approved June 29, 1915, in force July 1, 1915, as subsequently amended, at the time this act shall come in force and effect in such city." Section 50 then provides that all of the assets of the old Police Pension fund shall be transferred to the fund created by your act and "such police pension fund shall then cease to exist." Section 50 further provides that all pensions allowed prior to January 1, 1922, shall thereafter be paid by your board according to the law or laws under which such pensions were allowed. It will be noted there is no provision made for the payment of pensions in any amounts excepting in such amounts as were allowed prior to Jan-

uary 1, 1922, and that no provision or even suggestion is contained in section 50 under which it could be contended that your board was to pay pensions allowed prior to January 1, 1922, in any amounts other than the amounts in which they were allowed and in accordance with the provisions of the law or laws under which they were granted. There is no provision that such pensions shall be paid according to any future amendment of the law under which such pensions were allowed. When your act adopted the provisions of the act of 1915 relative to pensions granted under the latter act, it adopted those provisions as they existed at the time of making reference to them (*City of Charleston v. Cadle*, 166 Ill 487). Such adoption of provisions does not include subsequent modifications of the statute so adopted, in the absence of express or strongly implied intent. (*Culver v. People*, 161 Ill 89; *Town v. McCarthy*, 172 Ill 279). Such intent is neither expressed nor implied in your act, and consequently the 1937 amendment to section 3 of the act of 1915 is not binding on your board.

The amendment attempts to amend sections 6 and 50 of the act of 1921, while specifically declaring itself to be an amendment to sections 3 and 4 of the act of 1915. This is violative of section 13 of article IV of the Constitution regulating the amendment of statutes.

There are certain other very serious constitutional and financial questions presented by the amendment here considered, but it is not deemed necessary to discuss them at this time in view of the limitations which the law places on your power to authorize payment of pensions allowed under prior pension acts.

I am of the opinion that your board has no legal right to pay the increased pensions provided for in the amendment to section 3 of the act of 1915.

INCREASE OF PENSION OF RETIRED POLICEMEN

(No. 9530—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—June 3, 1937—1 pp.*)

An amendment increasing the pensions of policemen who have already become separated from the service and are receiving a pension would be unconstitutional.

Citations:

Constitution: Illinois, art. 4, sec. 19.

Statute: Policemen's Annuity and Benefit Fund act, sec. 55.

Case: Porter v. Loehr, 332 Ill 353 (1929).

(2). *Computation of Annuities*

RECOMPUTATION OF ANNUITIES

(No. 9000—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—January 7, 1936—3 pp.*)

Any annuity properly fixed in accordance with the provisions of the Policemen's Annuity and Benefit Fund act must remain as originally fixed despite subsequent amendments unless those amendments are specifically made retroactive to require a change in computation.

Citations: Policemen's Annuity and Benefit Fund act, sec. 12 (as amended July 1, 1931), 17, 27(b), 37.
Ill. Laws (1933), p. 266.

POLICEMAN'S ANNUITY RIGHTS

(No. 8999—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—January 6, 1936—3½ pp.*)

If the combined amount of the prior service annuity and the age and service annuity of a member of the Police department who is fifty years of age or over at the time of his resignation or discharge and has completed twenty or more years of service, is less than one-half of the compensation attached to or appropriated for the rank in the Police department which he held by virtue of civil service appointment on the day one year prior to his separation from the department, assuming that the compensation was not less than it was on July 1, 1931, he is entitled to the latter larger amount.

Citations: Police Pension Fund act (1921), sec. 27(b).
Policemen's Annuity and Benefit Fund act, sec. 15, 18, 27, 55.

FUTURE ENTRANT'S ANNUITY

(No. 9003—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—January 7, 1936—4½ pp.*)

A police matron who became a contributor to the Policemen's Annuity and Benefit fund as a future entrant at the age of fifty-

five years, who in accordance with the law ceased to contribute to the Fund at the age of fifty-seven years, and who became separated from the service, is entitled to be paid an annuity of such an amount as was fixed for her upon her attainment of the age of fifty-seven years. Her contribution to the Fund or the deductions from her salary paid into the Fund cannot be refunded to her.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, sec. 12, 16, 26(a, b),

Other reference: Op. Corp. Coun. (1924-25), p. 747. 29(a), 39, 48½.

EFFECT OF PROCEEDINGS TO REGAIN POSITION ON POLICEMAN'S ANNUITY RIGHTS

(No. 9002—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—January 6, 1936—5½ pp.*)

No proceeding begun by any policeman who was retired under the provisions of the Policemen and Firemen Retirement act,³⁸ and who is entitled to receive an annuity under the Policemen's Annuity and Benefit Fund act, to regain his position in the police service will in any manner affect his right to receive his annuity nor prejudice any future right to his annuity, irrespective of the outcome of the proceedings.

In the event that the policeman is reinstated he should pay into the Policeman's Annuity and Benefit Fund such an amount of deductions from the salary attached to his rank as would have been paid into the Fund had he been continuously in the police service, and if he recovers his salary for the period of his enforced retirement, he should pay into the Fund the full amount received by him as an annuity from the Fund together with interest on the separate payments at the rate of four per cent per year from the date of the payments.

Citations:

Statute: ISBS '35, 24: 852, 863, 866, 880, 882, 907.

Case: Stiles v. Police Pension Fund of West Chicago Park Commissioners, 281 Ill 636 (1918).

Other references: 16 Op. Corp. Coun. 420.

18 Op. Corp. Coun. 292 (No. 8772), 295 (No. 7954).

³⁸ See footnote 31, p. 406.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion concerning the pension rights of retired policemen, the following is submitted:

Your letter asks for an opinion as to what the effect, if any, would there be upon a policeman who has been retired under the new Policemen and Firemen retirement act and who brings a court proceeding to have himself reinstated in the department after he has been retired—in other words what would be the effect, if any, upon the pension or annuity rights of a policeman who applies for a pension and subsequently brings a proceeding in court to have himself reinstated in the department on the ground that he was illegally and improperly retired.

Pensions and annuities are payable by your board under a specific act of the legislature and are payable solely in accordance with the provisions of the act governing the fund, which act is entitled

"An Act to provide for the creation, setting apart, maintenance, and administration of a policemen's annuity and benefit fund in cities having a population exceeding two hundred thousand inhabitants." (Illinois State Bar Statutes, 1935, chap. 24, par. 852.)

Section 15 of the above act provides that annuity to be known as "age and service annuity" shall be provided for future entrants and for present employees. Section 18 provides for additional annuity called "prior service annuity" for present employees. Other sections of the act provide the manner in which these different types of annuity are to be computed.

Sections 29 and 31 provide respectively that any future entrant or any present employee whose age and whose accumulations from contributions to your fund entitle him to annuity, shall have a right to receive annuity from and after the date of his resignation or discharge from the service.

Section 55 of the act provides for the payment of a minimum annuity to any present employee who resigns or is discharged from the service after he shall have attained the age of fifty years or upwards and shall have completed twenty or more years of service.

Section 12 defines a "present employee" as a policeman who was in the service on December 31, 1921, and defines "discharge" as "complete separation from the service."

It therefore follows that any policeman who has been retired from active service is entitled to receive annuity from and after the date of his separation from the service in accordance with the provisions of the act governing your fund, if the required conditions as to age and length of service exist in the case of the policeman concerned. This right is a legal right of which he cannot be deprived.

As to any possible effect upon a policeman's right to annuity as a consequence of legal proceedings being instituted by him in an effort to secure his reinstatement in the active service of the department, there is no provision in the law governing annuities and pensions prohibiting such litigation on the part of a policeman, or terminating his pension because of

such litigation or depriving him of any of his annuity rights because of the institution of any such proceedings. The case of *Stiles v. Board of Trustees*, (281 Ill 636) was a proceeding in mandamus by a park policeman to secure a pension while proceedings for his reinstatement in the park police department were pending. The Supreme Court held that whatever position a policeman takes, either that he is entitled to be restored to the active list of policemen or to be a pensioner can in no way prejudice him or estop him from asserting and establishing whatever lawful rights he had in the premises in either case and that he is not precluded or estopped from claiming a pension during the time he was out of the service while conducting proceedings for reinstatement, the court saying at page 643 of the reported decision:

"Whatever position appellant takes, either that he is entitled to be restored to the active list of policemen or to be a pensioner can in no way prejudice respondent or estop the appellant from asserting and establishing whatever lawful rights he has in the premises. If the civil service board (here, the Commissioner of Police) had no jurisdiction * * * or authority to discharge him * * * and he has a legal remedy, he has the right to pursue such remedy. It is a matter entirely separate and distinct from and in no way concerned with his rights in this proceeding. If appellant is successful and is restored to the active list as a captain of police, of course, under the terms of the law, he would have no right to a pension as long as he was in active service, but the mere pending of a suit through which he might ultimately be restored to the active list could have nothing to do with his case unless he should be actually restored."

There have been a number of cases since your act came into force and effect in which policemen receiving pensions after having been discharged from the department have instituted proceedings to be reinstated, and all were paid their pensions during the entire period of their separation from the Police department. The only effect the litigation referred to has ever had or could have upon a pension or annuity would be that in the event a policeman was restored to active service by a court order payment of pension or annuity would cease; and if he recovered his salary for the period he was out of the service such policeman would be obliged to repay to your fund the amount which he had received in the form of a pension or annuity since he would not be entitled to retain both his salary and his pension or annuity payments for the same period. Some of the questions here involved have heretofore been passed upon in approved written opinions submitted to your board. [16 *Op. Corp. Coun.* 420, 18 *Op. Corp. Coun.* 292 (No. 8722), 295 (No. 7954)].

I am of the opinion that any policeman retired under the provisions of the Policemen and Firemen Retirement act who may be entitled to annuity or pension under your act is entitled to receive such annuity or pension; that no proceeding on his part to regain his position in the police service will in any manner affect his right to receive such annuity or pension during the pendency of such proceedings nor prejudice any future right to the same irrespective of the outcome of such proceeding; that in the event such policeman is reinstated such policeman shall pay into your fund such

an amount of deductions from the salary of his rank in the service as would have been paid into your fund had he been continuously in service; and that if he recovers his salary for the period of his enforced retirement he shall repay to your fund the full amount received by him from your fund with interest on the separate payments at the rate of four per cent per annum from the date of the several payments together with the salary deductions hereinbefore referred to.

SERVICE CREDIT FOR NAVAL SERVICE AFTER WAR

(No. 9699—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—November 9, 1937—2 pp.*)

The Policemen's Annuity and Benefit Fund act provides that in computing for annuity purposes the term of service rendered by any policeman prior to January 1, 1922, all periods of leave of absence during which the policeman was engaged in the military or naval service of the United States shall be counted as periods of service. Thus a policeman may receive a service credit for annuity purposes only for time spent in the United States Naval Reserve force after the cessation of war but before January 1, 1922.

Citation: IRS 37, 24: 994.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of Thomas J. Dohney, the following is submitted.

Your letter states that Thomas J. Dohney was first appointed as a patrolman in the Chicago Police department February 5, 1915; that on June 26, 1918, he left the service on a military furlough; that Mr. Dohney has supplied you with a copy of his discharge papers from the United States Naval Reserve force, which indicates that he was enrolled in that branch of the government service on June 3, 1918, and was honorably discharged therefrom on September 30, 1921. Your question is as to whether or not Mr. Dohney should be allowed service credit for the time spent in the United States Naval Reserve force, and if it should be dated September 30, 1921, which was almost two years after the date of the signing of the Armistice.

Section 49 of the act governing your fund (Illinois Revised Statutes, 1937, chap 24, sec. 994) provides that in computing the term of service rendered by any policeman prior to January 1, 1922, all periods of leave

of absence during which such policeman was engaged in the military or naval service of the United States of America shall be counted as a period of service for annuity purposes only. The act does not contain any provision limiting this credit to the period of the duration of a war, but includes the entire time such policeman was engaged in the military or naval service.

I am of the opinion that Mr. Dohney is entitled to be credited with the period in question as a period of service for annuity purposes only.

TRANSFER OF SERVICE CREDIT OF FORMER MEMBER OF MUNICIPAL ANNUITY FUND TO POLICE ANNUITY FUND

(No. 9613—Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—September 9, 1937—3½ pp.)

A person who was formerly a contributor to the Municipal Employees' Pension fund and its successor, the Municipal Employees' Annuity and Benefit fund, having served as a member of the Police department for more than ten years, may pay into the Policemen's Annuity and Benefit fund an amount equal to that which would have accumulated to his credit in the Policemen's Annuity and Benefit fund from salary deductions for annuity purposes on the date that he shall pay that amount into the Policemen's Annuity and Benefit fund, had he been paying into the Policemen's Annuity and Benefit fund what he paid into the Municipal Employees' Pension fund and the Municipal Employees' Annuity and Benefit fund. He may not pay into the Policemen's Annuity and Benefit fund the amount which would have been deducted from his salary during the period prior to his becoming a member of the Police department had he been a participant in the Policemen's Annuity and Benefit fund.

The money so contributed by the person shall be credited to his account together with contributions made by the City according to the terms of the Municipal Employees' Annuity and Benefit Fund act on salary deductions since January 1, 1922, and the total amount shall be used in computing any annuity

to which he may hereafter become entitled. The service so credited, however, cannot be used as the basis for retirement at half-pay.

Citation: ISR 37, 24: 985a.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion as to service credits for Mrs. Josephine M. Farrell, the following is submitted.

Your letter states that Josephine M. Farrell was appointed as a matron in the Police department on May 31, 1923; that the records of the Municipal Employees' Annuity and Benefit fund show that she was certified on May 20, 1916, as bathroom attendant, suspended September 27, 1916, took a new examination and was certified as bathroom attendant on December 5, 1916; that she resigned on May 25, 1923, and received a refund of salary deductions in September, 1923, in the sum of \$164.70. Your question is as to whether Mrs. Farrell is entitled to credit for the service prior to 1923, and if she should be requested to pay into your fund the amount that would have been deducted from her salary during that time had she been a participant in your fund.

Section 41½ of the act governing your fund (Illinois Revised Statutes, 1937, chap. 24, sec. 985a) provides that any contributor to and participant in your fund who has served as a member of the Police department for a period of ten or more years and who, prior to becoming a member of the Police department, was in the employ of the City and was a contributor to and participant in any pension fund or in any other annuity and benefit fund existing in the City by operation of law, shall have the right to pay into your fund an amount equal to the sum which would have accumulated to the credit of such policeman in your fund from deductions from salary for annuity purposes on the date when such payment shall have been made into your fund if such policeman had been paying into your fund such sums as he actually paid into such pension fund or into such other annuity and benefit fund; also that on salary deductions subsequent to January 1, 1922, the City shall contribute such amounts as are provided according to the terms of the act governing such other annuity and benefit fund; also that no credit shall be allowed for any period of time for which salary deductions or contributions by the policeman concerned have not been paid into your fund; also that the period of service rendered by such policeman prior to the date on which such policeman became a member of the Police department and for which such policeman has contributed or paid into your fund shall be credited to such policeman as a period of service for all purposes of your act excepting that thereby such policeman shall not have any of the rights conferred by the provisions of section 55 and section 55½ of your act, namely the right to retire on half-pay after twenty years of service and attainment of age fifty. In other words, credit shall be given for service rendered in any other department of the City upon payment into your fund of the amounts contributed by the person concerned into any other pension fund or annuity and benefit fund, but such credit shall not be used as the basis of retirement on half-pay.

I am of the opinion that Josephine M. Farrell, having served as a member of the Police department for more than ten years, has the right to pay into your fund an amount equal to the sum which would have accumulated to her credit in your fund from deductions from her salary for annuity purposes on the date when such payment shall have been made into your fund if she had been paying into your fund such sums as she actually paid into the Municipal Employees' Pension fund and later into the Municipal Employees' Annuity and Benefit fund, but does not have the right to pay into your fund the amount which would have been deducted from her salary during the period prior to 1923 had she been actually a participant in your fund during that period. The moneys so contributed by her shall be credited in her account, together with concurrent City contributions as hereinabove set out, and the total accumulation be the amount used in computing any annuity to which she may hereafter become entitled. The period of time so credited cannot be used as a basis for any grant of annuity under section 55 or section 55½ of your act.

ANNUITY AND WIDOW'S ANNUITY OF POLICE DEPARTMENT EMPLOYEE TRANSFERRED FROM FIRE SERVICE

(No. 9370—Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—December 14, 1936—21½ pp.)

A member of the Police department who originally entered the fire service and served there several years before he entered the Police department, where he has served continually until the present time, can get full credit in the Policemen's Annuity and Benefit Fund for his own and his widow's annuity, if he pays into that Fund (1) all the money which had previously been paid by him into the Firemen's Pension fund and which was returned to him, (2) all the money not contributed by him to the Firemen's Pension fund for any period of time during which he was in the fire service, and (3) all salary deductions required to be paid by him for annuity purposes during his service in the Police department.

If such an employee were to return to the Fire department, his status as to an annuity would be governed by the Firemen's Annuity and Benefit Fund act and would involve paying into that Fund all contributions paid into the Policemen's Annuity and Benefit fund and subsequently returned to him upon his separation from the Police department.

His widow's annuity depends on the accumulation to his credit for widow's annuity purposes at the time of his death. The factors to be considered are his period of service, the amount of his contributions, and his wife's age at the time she becomes a widow.

OPINION OF FOREGOING SYNOPSIS

Replying to your request for an opinion in the matter of Thomas W. Sullivan, the following is submitted.

Your letter encloses copy of letter addressed to your board from Thomas W. Sullivan, in which he states that he entered the fire service on November 19, 1917, and served therein until March 22, 1929, at which time he entered the Police department; that he has served in the Police department continuously since that time; and that he requests an opinion on the following matters:

- (a) "What would be required of me in order to get full credit in your fund towards my own annuity and my wife's annuity.
- (b) "What would be my status as to annuity if I were to return to the fire service.
- (c) "What would be my wife's annuity if I were to die from ordinary cause."

The answer to the first question is that all that would be required of Mr. Sullivan in order to get the full credit in your fund for his own and his wife's annuity would be for him to pay into your fund all moneys which had previously been paid by him into the Firemen's Pension fund and which were returned to him, and any moneys not contributed by him to the Firemen's Pension fund for any period of time during which he was in the fire service; also to pay into your fund all salary deductions required to be paid by him for annuity purposes during his service in the Police department. He is not required to again pay into your fund contributions made by him to the Firemen's Pension fund unless such contributions were subsequently returned to him by that fund.

The answer to the second question is that his status as to annuity if he were to return to the Fire department would be governed by the provisions of the Firemen's Annuity and Benefit Fund act and would simply involve a payment into the latter fund of all contributions made by him to your fund and subsequently returned to him upon his separation from the Police department.

The answer to the third question is that his wife's annuity would depend upon the accumulation to his credit for widow's annuity purposes at the time of his death. This would depend upon the usual factors of period of service, amount of contributions, and his wife's age at the time she becomes a widow. Your actuary informs me that were Mr. Sullivan to die from natural causes this month, his widow's annuity would be slightly over \$100.00 per month. This amount will increase with the years, providing Mr. Sullivan lives.

CREDIT IN POLICEMEN'S ANNUITY AND BENEFIT FUND FOR SERVICE IN FIRE DEPARTMENT

(No. 9371—Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—December 4, 1936—3 pp.)

A policeman who served in the Fire department several years should receive credit for that service in the Policemen's Annuity and Benefit fund. He is required to pay into the Policemen's Annuity and Benefit fund for that period of service any money which he contributed to the Firemen's Pension fund or Firemen's Annuity and Benefit fund, and which was subsequently refunded to him, together with an amount equal to any salary deductions not paid by him into the Firemen's Pension fund or the Firemen's Annuity and Benefit fund during his service in the Fire department.

Citations:

Statute: Policemen's Annuity and Benefit Fund act, sec. 41.
Other reference: 18 Op. Corp. Coun. 240 (No. 6677).

(3) Widow's Annuity

WIDOW'S COMPENSATION ANNUITY

(No. 9257—Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—August 5, 1936—2 pp.)

A policeman's widow cannot receive a compensation annuity under the Policemen's Annuity and Benefit Fund act unless she was his wife at the time he met with the injury which resulted in his death.

Citation: Policemen's Annuity and Benefit Fund act, sec. 33.

RIGHT TO WIDOW'S ANNUITY AFTER SECOND HUSBAND HAS DIED

(No. 9033—Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—February 4, 1936—1½ pp.)

The Retirement Board of the Policemen's Annuity and Benefit fund has no power to restore to the widow of a deceased police-

man the annuity which she had received up to her subsequent marriage to another, although her subsequent husband has died. Any right which she had to an annuity as the widow of her first husband became extinct upon her remarriage.

Citation: *Policemen's Annuity and Benefit Fund act, sec. 57.*

PENSION RIGHTS OF POLICEMAN'S WIDOW

(No. 9594—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—August 17, 1937—2 pp.*)

The widow of a policeman who was discharged in 1920 after twelve years of service, and who died in 1928, is not entitled to a pension as the law governing pensions at the time of the policeman's death did not provide for a pension to a widow of a policeman who had become separated from the Police department prior to July 1, 1921, unless the policeman at the time of his death was entitled to a pension under the Police Pension Fund act of 1915, which required at least twenty years of service for eligibility for a pension. No increased benefits can accrue to a widow of a policeman by reason of any law enacted after her husband's separation from the Police department, unless the law is made retroactive.

PENSION FOR POLICEMAN'S SON ATTAINING HIS MAJORITY BEFORE JULY 1, 1917

(No. 9060—*Retirement Board, Policemen's Annuity and Benefit Fund—G.F.M.—February 19, 1936—2 pp.*)

The widow of a policeman who is receiving a pension under the Police Pension Fund act of 1887 is not entitled to receive a pension for a son who attained his majority before an amendment to the Police Pension Fund act of 1915 which provided pensions for deceased policemen's children as well as for widows, and which became effective on July 1, 1917, as the amendment was not made retroactive.

Citations: *Police Pension Fund act of 1887.*

Police Pension Fund act of 1915 as amended (1917).

E. OTHER ANNUITY AND BENEFIT FUNDS

PARTICIPATION OF RETIREMENT BOARD EMPLOYEE IN ANNUITY FUND

(No. 9369—*Retirement Board, Municipal Court and Law Department Employees' Annuity and Benefit Fund—G.F.M.—December 15, 1936—1 pp.*)

Employees of the Retirement Board of the Municipal Court and Law Department Employees' Annuity and Benefit fund are not eligible to become contributors to the Laborers' and Retirement Board Employees' Annuity and Benefit fund unless they apply for participation in that Fund within six months after the beginning of their employment. Deductions cannot be made from any salary and paid into the latter Fund until the employee concerned has applied for membership.

Citation: ISBS '35 24: 801 (12).

REFUND OF SALARY DEDUCTIONS TO CHILDREN OF DECEASED EMPLOYEE OF ELECTION BOARD

(No. 9531—*Retirement Board, Board of Election Commissioners Employees' Annuity and Benefit Fund—G.F.M.—June 3, 1937 2½ pp.*)

Money deducted from the salary of an employee of the Board of Election Commissioners who died leaving no wife or minor children, but leaving adult children, should be paid with interest at four per cent to those adult children in equal parts.

Citations:

Statutes: ISBS '35, 24: 815 (76, 97).

Other reference: 18 Op. Corp. Coun. 260 (No. 5612).

REFUND OF SALARY DEDUCTIONS FOR PENSION TO DISCHARGED HOUSE OF CORRECTION GUARD

(No. 9481—G.F.M.—April 8, 1937—1½ pp.)

A person who was discharged as a guard in the House of Correction, and failed to apply within ninety days for a refund of his salary deductions paid into the House of Correction Pension fund, cannot now recover any part of those salary deductions unless he can convince the trustees of that Fund that there was some legal reason for his failure to apply for a refund of his salary deductions within the statutory time limit.

Citation: ISBS '35, 67: 19, 20.

Opinion No. 9490 (1 p.) of April 15, 1937, to the President of the House of Correction Employees' Pension fund holds substantially the same as the above opinion.

PAYMENT OF VOUCHERS FOR POLICEMEN'S AND FIREMEN'S DEATH BENEFIT TRUST FUNDS

(No. 9520—City Comptroller—G.F.M.—May 15, 1937—2 pp.)

The ordinance of September 9, 1936, relating to the payment of death benefits to families or dependents of policemen and firemen whose trust estate is exhausted or has frozen assets, has for its purpose the carrying out of the statutory and ordinance provisions requiring actual payment "to the family or dependents" of the policeman and fireman concerned. As the additional payments provided by the ordinance, when added to what has already been paid to the families or dependents, will not exceed the amount of the original awards, the City Comptroller is authorized to pay the vouchers issued under the ordinance.

CHAPTER XV

LIABILITY OF THE CITY FOR DAMAGE AND INJURY

A. GOVERNMENTAL FUNCTIONS

(1) *Fire Protection*³⁹

LIABILITY FOR DAMAGE BY FIRE APPARATUS

(No. 9147—*Chairman, Committee on Finance—E.L.M.—May 5, 1936—2½ pp.*)

The maintenance and operation of a Fire department is an exercise of the police power conferred upon the City by the State and the City is not liable for injury to persons or property arising out of such an exercise of its police power.

The City is not liable for damage caused to an automobile by its fire department apparatus responding to an alarm.⁴⁰

Citations: *Wilcox v. Chicago*, 107 Ill 334 (1883).
Chicago v. Williams, 182 Ill 135 (1899).
Chicago v. Selz, Schwab and Co., 202 Ill 545 (1903).
Tollefson v. Ottawa, 228 Ill 134 (1907).
Johnston v. Chicago, 258 Ill 494 (1913).
Consumers Co. v. Chicago, 313 Ill 408 (1925).
Roumbos v. Chicago, 332 Ill 70 (1929).
Gebhardt v. Village of LaGrange Park, 354 Ill 234 (1934).

³⁹ The Illinois Appellate court in *Blagay v. Chicago* [290 Ill App 598 (1937), 7 NE (2d) 934] held that a Fire department truck used to haul dirt to fix a rock garden for the Fire department was engaged in a ministerial and not a governmental function.

⁴⁰ It is the opinion of the Department of Law that the statute (IRS '37, 70:9) making the City liable for the negligence of firemen driving fire vehicles is of doubtful constitutionality. See Opinion No. 7303, 18 *Op. Corp. Coun.* 942.

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper and correspondence in the claim of John O'Malley * * * * for damage to automobile by fire department apparatus, engine number 42, while responding to an alarm. The fire was in the building located at 215 W. Superior street and the O'Malley car was parked in front of said building. You request an opinion as to the liability of the City in the premises.

The law is well settled that the maintenance and operation of a fire department by a municipality is an exercise of the police power conferred upon the municipality by the State and the municipality is not liable to respond in damages for injury to persons or property arising out of such exercise of its police power.

There are some duties the nature of which as governmental is too well settled to be disputed, such as the establishment and maintenance of schools, hospitals, fire and police departments, jails, workhouses, police stations, and the like. In fact, duties connected with the preservation of the safety, peace, health, or the prevention of the destruction of property by fire are all governmental duties without question, and hence there is no municipal liability for torts in connection therewith, or at least not under ordinary circumstances.

The grounds of exemption from liability for injury arising out of the negligence of municipal employees engaged in a governmental function are that the City is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the health, safety, and general welfare of the inhabitants or of the community; that employees engaged in the operation and maintenance of its Fire department, although appointed by the municipality are not, when acting in the discharge of their duties, servants or agents in the employment of the City for whose conduct the City can be held liable, but they act rather as public officers or officers of the City charged with a public service for whose negligence or misconduct in discharge of official duty no action will lie against the City unless expressly given, and hence the maxim of *respondeat superior* has no application. This principle has been consistently followed by our courts in a great number of cases, among which are:

Wilcox v. City of Chicago, 107 Ill 334.

City of Chicago v. Williams, 182 Ill 135.

City of Chicago v. Selz, Schwab and Co., 202 Ill 505.

Tollefson v. City of Ottawa, 228 Ill 134.

Johnston v. City of Chicago, 258 Ill 494.

Consumers Co. v. City of Chicago, 313 Ill 408.

Roumbos v. City of Chicago, 332 Ill 70.

Gebhardt v. Village of LaGrange Park, 354 Ill 234.

We are of the opinion therefore that no liability attaches to the city of Chicago because of the injury to the automobile of John O'Malley herein complained of.

Opinion No. 9042 (2½ pp.) of February 6, 1936, to the Chairman of the Committee on Finance and Opinion No. 9179 (2½ pp.) of May 25, 1936, hold substantially the same as the preceding opinion.

CITY LIABILITY FOR DAMAGE BY FIRE DEPARTMENT MAINTENANCE TRUCK

(No. 9397—Chairman, Committee on Finance—E.L.M.—January 14, 1937—3½ pp.)

The City is not liable for damage caused to an automobile by a Fire department maintenance truck as in maintaining a Fire department the City is acting under a police power to safeguard the public from fires.⁴¹

Citations: Wilcox v. Chicago, 107 Ill 334 (1883).
Chicago v. Williams, 182 Ill 135 (1899).
Chicago v. Selz, Schwab, and Co., 202 Ill 545 (1903).
Tollefson v. Ottawa, 228 Ill 134 (1907).
Johnston v. Chicago, 258 Ill 494 (1913).
Consumers Co. v. Chicago, 313 Ill 408 (1925).
Roumbos v. Chicago, 332 Ill 70 (1929).
Gebhardt v. Village of LaGrange Park, 354 Ill 234 (1934).

LIABILITY FOR WATER SUPPLY FAILURE DURING FIRE

(No. 9137—Chairman, Committee on Finance—E.L.M.—April 29, 1936—5 pp.)

The City is not liable for the additional damage to an automobile by fire which resulted from the failure to secure water from a hydrant as the City is not liable for injuries growing out of the failure to supply water for the extinguishment of fire.

Citation: Wallace v. Mayor and City Council of Baltimore, 123 Md 638 (1914).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper and correspondence in the claim of John B. Fleming, * * * * for damage to automobile. You request an opinion as to the liability of the City in the premises.

⁴¹ See footnote 40, p. 462.

Mr. Fleming submits the following statement of his claim:

"On Feb. 10th, 1936, a fire occurred in the rear of 6428 South Laffin St., burning the garage and completely destroying the automobile stored therein. The fire was discovered at its inception and the alarm was given immediately. The fire station house is located only a block and a half from the scene of the fire and the firemen arrived almost instantly, but due to the fact that the fire hydrant which is located directly in front of the above address was frozen (a fact that was discovered after the hose was connected and the pumper started) it was necessary for them to disconnect and again connect the hose at the next fire hydrant a half block away. This connecting and disconnecting of the hose caused considerable delay and as a result the fire gained such momentum that by the time the firemen were able to extinguish it the car was completely destroyed. The car, a 1932 Plymouth sedan, was purchased July 18th, 1935, for the sum of \$275.00. While I do not believe that the City is responsible for the entire loss I contend that you are liable for that portion caused by the frozen hydrant, which it is your duty to keep in working condition. Therefore, I am submitting a claim of \$135.00 which covers the extent of the damage directly due to the frozen hydrant."

Howard Andrews, chief of the 12th battalion, Chicago Fire department, in a report on the fire complained of, copy hereto attached, states:

"Engine Company No. 64's line was stretched but they had suffered a short delay in changing same due to having first secured a double Creiger hydrant in front of 6428 Laffin Street which they found out of service on account of a broken center stem. Without breaking their line they immediately proceeded to the next hydrant at the N. W. corner of 65th and Laffin Streets and changed line. The fire was confined to the garage and contents, with both garage and automobile being damaged by fire. In my opinion, the short delay in changing hydrants had no bearing on amount of damage incurred by this fire as both the interior of garage and automobile were fully involved on the department arrival."

Without regard to the facts in this particular case the law appears to be well settled that municipal corporations are not liable for injuries under the circumstances herein complained of.

The question of the liability of a municipal corporation to respond in damages for injury caused by the failure of a municipally owned waterworks to supply water to extinguish a fire has been considered by the supreme courts of many States and there is a substantial unanimity in the opinion that municipalities are not liable in such cases. Likewise the recognized authorities on municipal law are in accord on the proposition that there is no municipal liability for injuries growing out of negligence in failure to supply water for the extinguishment of fire.

In a Maryland case where the facts are substantially the same as those set up in the Fleming claim, the Supreme Court of that State in a well considered opinion expresses what appears to be the accepted view

of the recognized authorities on the questions involved in the following language:

"It is seen from the averments of the *narr.* that there is not involved in this case the question of the liability of the appellee for its failure to furnish water to the appellant for which he was paying rental, but only its failure to furnish water to the Fire department for its use in extinguishing a fire.

"*Dillon on the Law of Municipal Corporations*, section 66, states: 'Municipal corporations * * * possess a double character—the one governmental, legislative or public; the other, in a sense, proprietary or private * * *. In its governmental or public character the corporation is made by the State one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself'. And the same author states, section 1340: 'The protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger, and municipalities are usually authorized by statute to provide and maintain fire engines, and to supply water for the extinguishment of fires. The statutes generally do not impose any duty, and, when availed of, the task undertaken is discretionary in its character. The grant of such power must be regarded as exclusively for public purposes and as belonging to the municipal corporation, when assumed, in its public, political or legislative character. A city, therefore, does not, by accepting or acting under such a statute, and building its water works, enter into any contract with or assume any implied liability to the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained. There is no implied contractual or other relation between the city and the public, within its boundaries, with respect to the construction of water works, which makes the city liable for a failure to exercise reasonable care and diligence in respect to their maintenance. Accordingly, when it has been sought to hold municipal corporations for the *loss and destruction of buildings through the inadequacy of the water supply to protect them, or to extinguish fires*, the courts have usually held that the *municipality is not liable*. The fact that water rates or rents are paid by the inhabitants of the city does not create an implied liability in such a case * * *. Within these principles, it has been held that there is no liability by a city for loss sustained by fire where the wrongful act charged was *neglect in cutting off water from a hydrant*, but for which the fire might have been extinguished; or in *failing to keep the reservoir in repair*, whereby the supply of water became inadequate, or because the *pipes were inadequate or out of order*'.

"The same principle is laid down in *McQuillin on Municipal Corporations*, section 2682: 'In a previous volume, it was stated that 'where a municipality owns its own plant, it is liable for injuries sustained by a consumer by reason of an insufficient supply.' This statement is incorrect, however, insofar as it may be construed as imposing liability on municipalities possessing their own water plant, for their negligence in not furnishing sufficient water or pressure to extinguish fires,

or in not keeping the mains, hydrants, etc., in repair, which results in loss by fire, since it is well settled that in such a case the municipality is engaged in the performance of a governmental, as distinguished from a corporate duty.'

"In *Farnham on Waters*, section 158 c, it is stated: 'It is no part of the duty imposed upon a municipal corporation by its organization, to undertake to prevent or extinguish fires that may occur within its limits. But the protection of property is within the objects over which it may legitimately be given control, and it may, therefore, be empowered to procure a supply of water for the purpose of aiding the inhabitants in preventing or extinguishing fires that may occur. In undertaking to provide a supply of water for the prevention and extinguishment of fires, however, and in the organization of a department for that purpose, it acts in its purely governmental capacity, and it can not be called to account by a private citizen for the use which it makes of such power. The extent and manner of the exercise of its powers are necessarily to be determined by the judgment and discretion of the municipal authorities, and the municipality is not liable for a defect in their execution. It is, therefore, not liable for failure * * * to keep a sufficient supply of water.'

"In determining municipal liability for injuries due to negligence in the operation of water works, courts have generally viewed the subject in a two-fold aspect due to the fact that a municipal corporation, in maintaining water works, not only sells water to its inhabitants for domestic purposes, in the performance of which function it is practically always held to be acting in a private corporate capacity and for its own benefit, but also gratuitously furnishes water to be used in extinguishing fires, in the performance of which duty it is acting in a public governmental capacity. *Taintor v. Worcester*, 123 Mass 311; *Grant v. Erie*, 69 Pa St 420; *Mendel v. Wheeling*, 28 W Va 233; *Springfield Ins. Co. v. Keeseville*, 148 NY 46; *Wright v. Augusta*, 78 Ga 241; *Miller v. Minneapolis*, 75 Minn 131; *Edgerly v. Concord*, 62 NH 8; *Robinson v. Evansville*, 87 Ind 334." (*Wallace v. Mayor and City Council of Baltimore*, 123 Md 638.)

This sound statement of the law is supported by the overwhelming weight of authority and we are of the opinion, therefore, that the city of Chicago is not liable for the damage resulting from the fire herein complained of.

LIABILITY FOR DAMAGE BY INSTALLATION OF FIRE HYDRANT

(No. 9681—Chairman, Committee on Finance—E.L.M.—October 11, 1937—4½ pp.)

The City is not liable for damage to a claimant's property resulting from the alleged failure of employees of the Division

of Water Pipe Extension to notify the claimant personally that they were shutting off his water supply in order to install a fire hydrant. In installing and maintaining hydrants for use by the Fire department to extinguish fires and not for commercial use, the City is exercising a governmental function⁴² and is not liable for damage or injury resulting from the negligence of its employees while so engaged.

Citations: Wilcox v. Chicago, 107 Ill 334 (1883).
Culver v. City of Streator, 130 Ill 238 (1889).
Chicago v. Williams, 182 Ill 135 (1889).
Chicago v. Selz, Schwab and Co., 202 Ill 545 (1903).
Tollefson v. City of Ottawa, 228 Ill 134 (1909).
Johnston v. Chicago, 258 Ill 494 (1913).
Consumers Co. v. Chicago, 313 Ill 408 (1925).
Roumbos v. Chicago, 332 Ill 70 (1929).
Gebhardt v. Village of LaGrange Park, 354 Ill 234 (1934).

OPINION OF FOREGOING SYNOPSIS

We have your letter, together with Council paper, correspondence and bills, in the claim of Michael J. Moran * * * for damage to water heater. You request an opinion as to the liability of the City in the premises.

Mr. Moran submits the following statement of his claim:

"The facts are that one of the Water department employees notified my tenant on the first floor that they were going to shut the water off to install a new fire plug. The tenant did not notify me and when they shut the water off, my water heater was still going. When they finished installing the new fire plug, they turned on the water and the cold water burst the heater, so I was obliged to go to Sears and purchase a new water heater. The installion (sic) of this heater cost me \$5.00 and the heater and fittings \$20.92, or a total of \$25.92.
* * *

Attached are bills for cost of heater, \$20.92, and the installing of same, \$5.00, totaling \$25.92.

The Division of Investigation of the City Law department reports that the Division of Water Pipe Extension advises that it installed a new fire hydrant in the street at the location and at the time Mr. Moran complains of, and that the people occupying the first floor of the two flat building (in which Mr. Moran lives) were notified that the water would be shut off while the fire hydrant was being installed. The Division of Investigation further reports that the tenant of the first floor flat admits that she was so notified but that she did not advise the Moran family of the notification; and that Moran insists that he was not notified of the shutting off of the water from his building.

⁴² See footnote 40, p. 462.

The question as to whether notice of the temporary stoppage of water into the two flat building served on the tenant of the lower flat was sufficient or whether the City was negligent in failing to notify the owner or some member of his family living in the second flat becomes unimportant in view of the fact that the fire hydrant that was being installed at the time complained of is one of the Fire department appliances of the City and hence the occurrence complained of did not involve the City in liability. Sound fire hydrants are a necessary and essential part of the City Fire department.

The law is well settled that the maintenance and operation of a Fire department by a municipality is an exercise of the police power conferred upon the municipality by the State and the municipality is not liable to respond in damages for injury to persons or property arising out of such exercise of its police power.

There are some duties the nature of which as governmental is too well settled to be disputed, such as the establishment and maintenance of schools, hospitals, fire and police departments, jails, workhouses, police stations, and the like. In fact, duties connected with the preservation of the safety, peace, health, or the prevention of the destruction of property by fire are all governmental duties without question, and hence there is no municipal liability for torts in connection therewith.

The grounds of exemption from liability for injury arising out of the negligence of municipal employees engaged in a governmental function are that the City is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the health, safety, and general welfare of the inhabitants or of the community; that employees engaged in the operation and maintenance of its Fire department, although appointed by the municipality, are not, when acting in the discharge of their duties, servants or agents in the employment of the City for whose conduct the City can be held liable, but they act rather as public officers or officers of the City charged with a public service for whose negligence or misconduct in discharge of official duty no action will lie against the City unless expressly given, and hence the maxim of *respondent superior* has no application. This principle has been consistently followed by our courts in a great number of cases, among which are:

Wilcox v. City of Chicago, 107 Ill 334

Culver v. City of Streator, 130 Ill 238

City of Chicago v. Williams, 182 Ill 135

City of Chicago v. Selz, Schwab and Co., 202 Ill 545

Tollefson v. City of Ottawa, 228 Ill 134

Johnston v. City of Chicago, 258 Ill 494

Consumers Co. v. City of Chicago, 313 Ill 408

Roumbos v. City of Chicago, 332 Ill 70

Gebhardt v. Village of LaGrange Park, 354 Ill 234

In the case of *Culver v. City of Streator*, *supra*, the court, in defining the police power, said:

"* * * That power may be defined in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc*, police officers."

It appears from the statement of the claimant that the injury to his property resulted from the failure of the City employees to notify him personally of the intention to shut off his water supply while said City employees were installing a "fire plug." The Division of Water Pipe Extension reports that at the time and location complained of it was installing a "new fire hydrant." Nowhere does it appear that the hydrant in question was used or to be used for any purpose other than an appliance of the City Fire department for extinguishing fires.

In installing and maintaining fire hydrants for the use of the City Fire department in extinguishing fires, and not for commercial use, the City is exercising a governmental function and is not liable to respond in damages for injury to persons or property resulting from the negligence of its officers, agents, or servants while so engaged, and we are of the opinion, therefore, that the city of Chicago is not liable for the injury to his property herein complained of by Mr. Moran.

Opinion No. 9713 (4½ pp.) of November 30, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE OF WATER EXTENSION DIVISION TRUCK AIDING FIRE FIGHTING

(No. 9301—Chairman, Committee on Finance—E.L.M.—October 6, 1936—4 pp.)

The City is not liable for damage to an automobile which collided with a truck of the Water Extension division that was aiding the Fire department fight a fire, as the City is not responsible for negligent acts of its employees who are endeavoring to carry out its regulations to promote the public safety by suppressing fires.⁴³

Citations: *Wilcox v. Chicago*, 107 Ill 334 (1883).
Chicago v. Williams, 182 Ill 135 (1899).
Chicago v. Selz, Schwab and Co., 202 Ill 545 (1903).
Tollefson v. Ottawa, 228 Ill 134 (1907).
Johnston v. Chicago, 258 Ill 494 (1913).
Consumers Co. v. Chicago, 313 Ill 408 (1925).
Roumbos v. Chicago, 332 Ill 70 (1929).
Gebhardt v. Village of LaGrange Park, 354 Ill 234 (1934).

⁴³ See footnote 40, p. 462.

(2) *Police Protection*

LIABILITY FOR DAMAGE BY POLICE PATROL WAGON

(No. 9427—*Chairman, Committee on Finance—E.L.M.—February 11, 1937—1½ pp.*)

The City is not liable for damage caused to an automobile which collided with a police patrol wagon while that wagon was performing police duties. In maintaining the Police department, the City is acting in a governmental capacity for the safety and general welfare of the public and is not liable for damage to property resulting from that municipal activity.

Citation: 18 Op. Corp. Coun. 901.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9130—April 21, 1936—2½ pp.

No. 9131—April 21, 1936—2½ pp.

No. 9177—May 23, 1936—2 pp.

No. 9180—May 25, 1936—2 pp.

LIABILITY FOR INJURY OR DAMAGE BY OPERATION OF POLICE STATION

(No. 9228—*E.L.M.—July 10, 1936—2 pp.*)

The City is not liable for injuries to persons or property arising out of the maintenance and operation of police stations, as in the maintenance and operation of police stations the City is performing a governmental function.

LIABILITY FOR INJURIES BY ACTS OF POLICE OFFICERS

(No. 9058—*Chairman, Committee on Finance—E.L.M.—February 19, 1936—3 pp.*)

The City is not liable for injuries caused to an innocent bystander from shooting by its police officers while they were

apprehending some criminals. There is no legal authority which will permit the City to appropriate public funds for the relief of innocent sufferers from acts of the police.

Citations: *Chicago v. Williams*, 182 Ill 135 (1899).
Culver v. City of Streator, 130 Ill 238 (1899).
Arms v. City of Knoxville, 32 Ill App 604 (1899).
Chicago v. Pittsburgh, Cincinnati, Chicago and St. Louis Ry., 244 Ill 220 (1910).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9020—January 21, 1936—2½ pp.
No. 9128—April 20, 1936—2½ pp.
No. 9315—October 20, 1936—3½ pp.
No. 9736—December 28, 1937—1½ pp.

(3) *Garbage Collection and Disposal*

LIABILITY FOR DAMAGE BY GARBAGE TRUCK

(No. 9059 — *Chairman, Committee on Finance — E.L.M. — February 19, 1936 — 2½ pp.*)

The City is not liable for damage caused by a garbage truck, as in the collection and disposition of garbage the City is functioning under the police power of the State and performing duties imposed by law for the health and general welfare of the public.⁴⁴

⁴⁴ The Illinois Appellate Court held in *Schmidt v. Chicago*, 284 Ill App 570 (1936), that the operation of a garbage trailer is not a governmental function, and that the fact that the collection and disposition of garbage by a municipality incidentally benefits the public health does not necessarily make the removal of garbage a public or governmental function. The Illinois Appellate court took much the same attitude in *Wasilevitsky v. Chicago*, 280 Ill App 531 (1935). Both of these decisions are at variance with the decisions of the Illinois Supreme Court, which has not passed on the question of municipal tort liability for garbage collection since the *Wasilevitsky* decision by the Illinois Appellate Court.

Citations:

Case: *Consumers Co. v. Chicago*, 313 Ill 408 (1925).

Other reference: McQuillin, *Municipal Corporations*, vol. 6, sec. 2796, p. 775.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

- No. 8996—January 4, 1936—2½ pp.
- No. 9008—January 10, 1936—1½ pp.
- No. 9009—January 10, 1936—1½ pp.
- No. 9017—January 16, 1936—3½ pp.
- No. 9021—January 21, 1936—2½ pp.
- No. 9047—February 11, 1936—2½ pp.
- No. 9104—March 24, 1936—3 pp.
- No. 9105—March 24, 1936—2½ pp.
- No. 9121—April 9, 1936—2½ pp.
- No. 9133—April 21, 1936—3 pp.
- No. 9148—May 5, 1936—2½ pp.
- No. 9158—May 13, 1936—2½ pp.
- No. 9159—May 14, 1936—2½ pp.
- No. 9160—May 14, 1936—2½ pp.
- No. 9204—June 18, 1936—3 pp.
- No. 9216—July 2, 1936—3 pp.
- No. 9258—August 8, 1936—3 pp.
- No. 9278—September 14, 1936—2½ pp.
- No. 9280—September 14, 1936—2½ pp.
- No. 9281—September 14, 1936—2½ pp.
- No. 9283—September 15, 1936—2½ pp.
- No. 9291—September 21, 1936—3 pp.
- No. 9321—October 28, 1936—2½ pp.
- No. 9322—October 28, 1936—2½ pp.
- No. 9325—November 2, 1936—2½ pp.
- No. 9334—November 18, 1936—3 pp.
- No. 9340—November 23, 1936—2½ pp.
- No. 9388—January 8, 1937—2½ pp.
- No. 9396—January 14, 1937—3 pp.
- No. 9428—February 11, 1937—1½ pp.
- No. 9429—February 11, 1937—1½ pp.

LIABILITY FOR INJURY TO PERSON'S FEELINGS BY GARBAGE FALLING FROM TRUCK

(No. 9234—Chairman, Committee on Finance—E.L.M.—July 15, 1936—3½ pp.)

The City is not liable for injury to a person's feelings caused by garbage falling on her as she walked passed a City garbage

truck, as in collecting and disposing of garbage the City is performing a governmental function.⁴⁵

Citations:

Case: Consumers Co. v. Chicago, 313 Ill 408 (1925).

Other reference: McQuillin, Municipal Corporations, vol. 6, p. 775.

(4) *Health and Recreation*

CITY LIABILITY FOR DAMAGE BY BOARD OF HEALTH AUTOMOBILE

(No. 9411—Chairman, Committee on Finance—E.L.M.—January 27, 1937—2½ pp.)

The City is not liable for damage to an automobile alleged to have been caused by a Board of Health automobile while engaged in departmental service, as in the execution of duties that relate to the preservation of the public health and the care of the sick, the City performs a governmental function.

Citations: Chicago v. Seben, 165 Ill 371 (1897).
Chicago v. Williams, 182 Ill 135 (1899).
Evans v. City of Kankakee, 231 Ill 223 (1907).
Tollefson v. City of Ottawa, 228 Ill 134 (1907).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper and bills in the claim of Tony Jeffrey * * * * for damage to automobile in the sum of \$19 allegedly caused by a Board of Health automobile while engaged in departmental service. You request an opinion as to the liability of the City in the premises.

It is a well settled principle of law that a municipal corporation in the performance of a public service in which it has no particular interest, or from which it receives no special benefits in its corporate capacity, but which it is bound to see performed pursuant to the duty imposed by law for the general welfare of its inhabitants, acts in a governmental capacity charged with a public duty, and the doctrine of our courts is well established that a municipal corporation is not responsible for the negligence of its agents in the performance of governmental functions.

⁴⁵ See Footnote 44, p. 472.

- City of Chicago v. Seben*, 165 Ill 371
City of Chicago v. Williams, 182 Ill 135
Evans v. City of Kankakee, 231 Ill 223
Tollefson v. City of Ottawa, 228 Ill 134

In the Kankakee case the court said:

"The law is well settled that the police regulations of a city are not made or enforced in the interests of the city in its private capacity but in the interests of the public, and that a city is not liable for the acts of its officers in attempting to enforce police regulations; (citing authorities) and police regulations, it has frequently been said, include the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and that all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc*, police officers. (*Culver v. City of Streator, supra.*) * * * In *City of Chicago v. Williams, supra*, the court said (p. 138): 'Where acts are done by the officers of towns and cities in their public capacity, in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred.'"

The performance of duties that relate to the preservation of public health and care of the sick is of vital concern to the public as a whole; in executing this function both the municipality and the officers through whom it acts perform governmental or public duties, and we are of the opinion, therefore, that the City is not liable for the injury complained of by Mr. Jeffrey.

Opinion No. 9402 (2½ pp.) of January 18, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY OF TUBERCULOSIS SANITARIUM

(No. 9111—C.P.H.—April 1, 1936)

Hospitals, dispensaries, asylums, poor houses, and other charitable institutions to care for the sick, dependent, neglected, destitute, insane, or poor which are conducted by a municipality are not liable for personal injuries caused by the negligence of their agents or servants, in the absence of negligence in the selection of those agents or servants. Therefore, the Municipal Tuberculosis Sanitarium is not liable for the destruction of a glass eye by an X-ray machine operated by sanitarium employees.

CITY LIABILITY FOR BATHHOUSE INJURY

(No. 9423—Chairman, Committee on Finance—E.L.M.—February 8, 1937—2½ pp.)

The City is not liable for injuries suffered by a person in a City bathhouse, for in maintaining bathhouses for the general public health, it performs a governmental function and may not be held liable for damages arising out of the negligence of its employees in the discharge of that function.

Citation: *Gebhardt v. Village of La Grange Park*, 354 Ill 234 (1934).

OPINION OF FOREGOING SYNOPSIS

We have your letter and Council paper in the claim of Mrs. Marie Bumba * * * * for personal injuries. You request an opinion as to the liability of the City in the premises.

Mrs. Bumba gives no date of her accident and states her claim to be as follows:

"I went to take my bath at Public Bath House at 1855 S. Throop st. Sitting on bench taking my stocking off and slip, and broke my glasses and bruised my arm. I was under doctors care two weeks."

Damages are assessed at \$25.00.

Mary Gibbons, bathing attendant at the Pilsen Bath House, 1949-51 S. Throop street, reported that on September 3, 1936, about 1:10 P. M., a Mary Bumba complained that one of the seats in the shower room tipped over; that she broke her glasses and hurt her arm.

A municipal corporation does not insure the citizen against damage from works of its construction or maintenance. Its obligation and duty in such respect is measured by the exercise of reasonable care and vigilance. Liability can only be predicated upon its neglect or misconduct. In its corporate activities the duties exacted from a municipality are the same and the liabilities imposed on it are the same as those imposed upon a private corporation or individual engaged in the same enterprise.

In the claim here under consideration, no liability would attach to the City even if it were determined that the City operated and maintained the bathhouse in its corporate capacity as no facts appear upon which a charge of negligence against the City could be based. However, in the establishment and maintenance of parks, playgrounds, swimming pools, bathhouses, and the like the municipality is performing a governmental function for the general public health, recreation, and exercise and may not be held liable for damages arising out of the negligence of its servants in the discharge of the function. Such a function in no wise partakes of the nature of a corporate business or undertaking for profit but is by its nature a public benefit. (*Gebhardt v. Village of LaGrange Park*, 354 Ill 234.)

That in the maintenance of parks, playgrounds, swimming pools, and bathhouses for the healthful recreation of the general public, the City is exercising a governmental function appears to be conclusively determined by the Supreme Court in the *Gebhardt* decision, and we are of the opinion, therefore, that the city of Chicago is not liable for the injury to Marie Bumba herein complained of.

LIABILITY FOR INJURY AT BATHING BEACH

(No. 9689—Chairman, Committee on Finance—E.L.M.—November 4, 1937—3½ pp.)

The City is not liable for injuries sustained at a bathing beach, for in the establishment and maintenance of bathing beaches the City is performing a governmental function for the general public health, recreation, and exercise, and may not be held liable for injuries arising out of the negligence of its employees at such bathing beaches.

Citation: *Gebhardt v. Village of La Grange Park*, 354 Ill 234 (1934).

LIABILITY FOR INJURY IN PLAYGROUND

(No. 9088—Chairman, Committee on Finance—E.L.M.—March 11, 1936—3 pp.)

The City is not liable for injuries sustained by falling from playground apparatus in a City playground when the attendant was present, since in the establishment and maintenance of playgrounds the City is performing a governmental function for the general public health, recreation, and exercise, and may not be held liable for injuries arising out of the negligence of its employees in the discharge of that function.

Citation: *Gebhardt v. Village of La Grange Park*, 354 Ill 234 (1934).

Opinion No. 9320 (1½ pp.) of October 28, 1936, and Opinion No. 9326 (3 pp.) of November 2, 1936, to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

LIABILITY OF OWNER OF LOT USED FOR NEIGHBORHOOD PLAY PURPOSES BY CHICAGO PARK DISTRICT

(No. 9100—*Chicago Recreation Commission—M.D.S.—March 21, 1936—1½ pp.*)

The owner of a vacant lot ceases to be liable in damages when his lot has been cleared by the WPA and turned over to the Chicago Park District for neighborhood play purposes.

The duty of properly maintaining the lot is in the person or agency in charge and control of the lot, and if any accident occurs because of the condition of the lot, the responsibility, if any, rests with that person or agency.

(5) *Other Governmental Activities*

LIABILITY FOR INJURY OR DAMAGE IN CITY HALL

(No. 9181—*Chairman, Committee on Finance—E.L.M.—May 25, 1936—2½ pp.*)

The City is not liable for injuries or damages sustained in the City Hall. The maintenance of a public building exclusively for municipal purposes is a governmental function, and the City is not liable for negligence in the performance of its governmental functions.

Citation: McQuillin, *Municipal Corporations*, vol. 6, sec. 2846.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9156—May 9, 1936—2 pp.

No. 9217—July 2, 1936—3½ pp.

No. 9483—April 9, 1937—2 pp.

No. 9574—July 27, 1937—1 p.

No. 9639—September 14, 1937—1 p.

LIABILITY FOR INJURY RESULTING FROM TRAFFIC SIGNAL LIGHT INSTALLATION

(No. 9682—Chairman, Committee on Finance—E.L.M.—October 18, 1937—4 pp.)

The City is not liable for injuries occurring to a person who stumbled in a street excavation which had been made for the purpose of installing traffic signal lights. The sole purpose of the City in installing and maintaining traffic light systems in the public streets is to provide for the safety and general welfare of the public. In the accomplishment of that purpose the City is exercising the police power of the State and is not liable for injuries to persons or property resulting therefrom.

Citations: *Dorminey v. City of Montgomery*, 166 So 689 (1936).
Wilcox v. Chicago, 107 Ill 334 (1883).
Chicago v. Selz, Schwab, and Co. 202 Ill 545 (1903).
Tollefson v. City of Ottawa, 228 Ill 134 (1909).
Johnston v. Chicago, 258 Ill 494 (1913).
Consumers Co. v. Chicago, 313 Ill 408 (1925).
Roumbos v. Chicago, 332 Ill 70 (1929).
Gebhardt v. Village of La Grange Park, 354 Ill 234 (1934).
Miralago Corp. v. Village of Kenilworth, 290 Ill App 230 (1937).

Opinion No. 9714 (4 pp.) of November 30, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR NEGLIGENCE OF EMPLOYEES TESTING MOTOR VEHICLES

(No. 9350—Chairman, Committee on Finance—E.L.M.—December 3, 1936—4½ pp.)

The City is not liable for the wrongful or negligent acts of its officers and employees in the management and operation of motor vehicle testing stations or lanes, as in establishing and operating such testing stations the City is acting under a police power conferred by the State in the interest of the public safety.

Citations: *People v. Chicago*, 256 Ill 558 (1912).
Evans v. City of Kankakee, 231 Ill 223 (1907).

LIABILITY FOR DAMAGE THROUGH NEGLIGENCE OF RELIEF EMPLOYEES

(No. 9710—Chairman, Committee on Finance—E.L.M.—November 23, 1937—4½ pp.)

In the administration of poor relief the City is exercising a governmental function, and is not liable for damage caused by the negligence of employees in the Relief Administration in maintaining a defective fire escape on a building under their control.

Citations: *People v. Chicago*, 256 Ill 558 (1912).
County of McLean v. Humphreys, 104 Ill 378 (1882).
Wilcox v. Chicago, 107 Ill 334 (1883).
Culver v. City of Streator, 130 Ill 238 (1889).
Chicago v. Williams, 182 Ill 135 (1899).
Chicago v. Selz, Schwab, and Co., 202 Ill 545 (1903).
Tollefson v. City of Ottawa, 228 Ill 134 (1907).
Johnston v. Chicago, 258 Ill 494 (1913).
Consumers Co. v. Chicago, 313 Ill 408 (1925).
Roumbos v. Chicago, 332 Ill 70 (1929).
Gebhardt v. Village of La Grange Park, 354 Ill 234 (1934).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper, invoice and correspondence in the claim of A. No. 1 Express and Cartage Corporation, * * * * for damage to automobile. You request an opinion as to the liability of the City in the premises.

Claimant submits the following statement of claim:

"On the morning of May 5th, 1937, at 8 A. M., a Ford truck of the claimant, A. No. 1 Express, Inc., located at and doing business at 830 Miller street, Chicago, Illinois, was damaged by the falling of a fire escape from a building located at 222 South Morgan street in the City of Chicago. The truck of the claimant was going in an easterly direction in an alley adjoining the aforesaid property when the fire escape, without warning fell upon the truck doing considerable damage thereto. This building, located at 222 South Morgan street, where this accident occurred, was on the date of May 5th, 1937, under the control of the Chicago Relief Administration who had leased the building from one Mr. Brannon (c/o Faroll Brothers, 141 West Jackson boulevard) who has disclaimed all liability for said accident, claiming that the Relief Administration was liable under its lease to keep said building in repair. An investigation shows that the fire escape had been loose for several days, and that the Relief Administration was aware of this fact, having same repaired immediately after the accident."

Attached is a copy of an itemized receipted bill for repairs to truck in the sum of \$155.75.

The Division of Investigation of the City Law department reports that the building located at 222 S. Morgan street is operated by the Chicago Relief Administration as a shelter for single men and submits the attached report of the occurrence made by W. R. Harvey, Supervisor of Utilities, Chicago Relief Administration.

In the administration of poor relief, the city of Chicago is performing a governmental function as the arm or agent of the State and cannot be held liable for injuries to persons or property arising out of the performance of such duties unless expressly made so by statute.

In discussing the governmental functions of a municipal corporation as distinguished from its purely private or corporate activities and municipal liability in connection therewith, our Supreme Court said:

"When power conferred has relation to public purposes and for the public good it is to be classified as governmental in its nature and appertains to the corporation in its political capacity, but when it relates to the accomplishment of private purposes, in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for non-user or mis-user, while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation." (*People v. City of Chicago*, 256 Ill 558.)

And in classifying the care of the poor and unfortunate by the municipality as governmental in its character, the same court said:

"* * * It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise." (*County of McLean v. Humphreys*, 104 Ill 378.)

The grounds of exemption from liability for injury arising out of the negligence of municipal employees engaged in a governmental function are that the City is engaged in the performance of a public service in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the health, safety, and general welfare of the inhabitants or of the community; that employees engaged in the operation and maintenance of its poor relief administration, although appointed by the municipality, are not, when acting in the discharge of their duties, servants, or agents in the employment of the City for whose conduct the City can be held liable, but they act rather as public officers or officers of the City charged with a public service for whose negli-

gence or misconduct in discharge of official duty no action will lie against the City unless expressly given, and hence the maxim of *respondeat superior* has no application. This principle has been consistently followed by our courts in a great number of cases, among which are:

Wilcox v. City of Chicago, 107 Ill 334

Culver v. City of Streator, 130 Ill 238

City of Chicago v. Williams, 182 Ill 135

City of Chicago v. Selz, Schwab and Co., 202 Ill 545

Tollefson v. City of Ottawa, 228 Ill 134

Johnston v. City of Chicago, 258 Ill 494

Consumers Co. v. City of Chicago, 313 Ill 408

Roumbos v. City of Chicago, 332 Ill 70

Gebhardt v. Village of LaGrange Park, 354 Ill 234

In the case of *Culver v. City of Streator*, *supra*, the court, in defining the police power, said:

“ * * * That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc*, police officers.”

In the administration of poor relief, the City is exercising a governmental function and is not liable to respond in damages for injuries to persons or property resulting from the negligence of its officers, agents, or employees while so engaged. We are of the opinion, therefore, that the city of Chicago is not liable for the injury to its motor-truck herein complained of by the A No. 1 Express and Cartage Corporation.

PAYMENT OF RELIEF EMPLOYEES' PROPERTY DAMAGE FROM RELIEF FUNDS

(No. 9425—*Commissioner of Relief—E.L.M.—February 8, 1937*
—21½ pp.)

In the absence of statutory authority, the Chicago Relief Administration cannot legally expend money appropriated for poor relief to pay for damages sustained by its employees to their wearing apparel in the course of their employment.

In the administration of poor relief the City is performing a governmental function as the arm or agent of the State and

cannot be held liable for damage to property arising out of the performance of such duties.

Citations:

Ordinance: Code '31: 609a-609h.

Cases: *People v. Chicago* 256 Ill 558 (1912).

McLean County v. Humphreys, 104 Ill 378 (1882).

OPINION OF FOREGOING SYNOPSIS

We have your letter and attached correspondence in the claims of Miss Florence E. Pauls and Mr. Theodore King for damage to wearing apparel sustained in the course of their employment. You request advice as to whether the Chicago Relief Administration can pay for damages of this type.

In the administration of poor relief, the city of Chicago is performing a governmental function as the arm or agent of the State and cannot be held liable for injuries to persons or property arising out of the performance of such duties unless expressly made so by statute.

In discussing the governmental functions of a municipal corporation as distinguished from its purely private or corporate activities and municipal liability in connection therewith, our Supreme Court said:

"When power conferred has relation to public purposes and for the public good it is to be classified as governmental in its nature and appertains to the corporation in its political capacity, but when it relates to the accomplishment of private purposes, in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether for non-user or mis-user, while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation." (*People v. City of Chicago*, 256 Ill 558.)

And in classifying the care of the poor and unfortunate by the municipality as governmental in its character the same court said:

"* * * It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise." (*County of McLean v. Humphreys*, 104 Ill 378.)

A careful examination of the statute and the ordinance "Providing for the Administration of Relief and Support of Poor and Indigent Persons Lawfully Resident within the City of Chicago" fails to disclose any author-

ization for the use of funds appropriated for poor relief in the payment of claims of the nature described by Miss Pauls and Mr. King, and in the absence of authority expressly conferred by statute, we are of the opinion that the Chicago Relief Administration could not legally justify expenditure of money appropriated for poor relief in satisfaction of said claims.

LIABILITY FOR PERSONAL PROPERTY LOST BY MUNICIPAL COURT JUROR

(No. 9424—*Chairman, Committee on Finance—E.L.M.—February 8, 1937—1 p.*)

The City is not liable for an overcoat lost by a juror in the Municipal Court, as the City is performing a governmental function as the arm or agent of the State when it maintains courts for the administration of justice.

LIABILITY FOR INJURIES TO ELECTION JUDGES AND CLERKS

(No. 9737—*Chairman, Committee on Finance—E.L.M.—December 29, 1937—4½ pp.*)

The City is not liable for injuries sustained in an automobile accident by judges and clerks of election who were delivering election ballots and returns to the Board of Election Commissioners. By the general election law, judges and clerks of election are officers of the County Court, and there is no legal liability on the part of the City for injuries sustained by officers of that court. As these injuries did not result from any neglect or misconduct on the part of the City, the City authorities cannot legally use the public funds to compensate for them.

Citations: Town of Petersburg v. Mappin, 14 Ill 193 (1852).

Agnew v. Brall, 124 Ill 312 (1888).

Chicago v. Pittsburg, Cincinnati, Chicago, and St. Louis Ry., 244 Ill 220 (1910).

B. CORPORATE FUNCTIONS

(1) *Streets and Other Public Ways*

LIABILITY FOR DAMAGE BY STREET DEFECT

(No. 9067—*Chairman, Committee on Finance—E.L.M.—February 24, 1936—3½ pp.*)

The City is not liable for injury or damage caused by an alleged street defect when it is not shown that the City had actual notice of the defect, or that circumstances were such that notice to the City of the defect would be implied.

The City is bound to use reasonable care to keep its streets in a reasonably safe condition, but it is not an insurer of the safe condition of its streets, and is not liable for injuries or damage that could have been prevented by the exercise of reasonable care and vigilance.

Citation: *Simon v. Chicago*, 279 Ill App 80 (1935).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

- No. 9055—February 18, 1936—2 pp.
- No. 9069—February 25, 1936—3 pp.
- No. 9071—February 25, 1936—2½ pp.
- No. 9073—February 26, 1936—2 pp.
- No. 9076—March 2, 1936—2½ pp.
- No. 9203—June 17, 1936—4½ pp.
- No. 9208—June 30, 1936—3½ pp.
- No. 9240—July 21, 1936—1½ pp.
- No. 9261—August 11, 1936—4 pp.
- No. 9273—September 10, 1936—2½ pp.
- No. 9337—November 19, 1936—3½ pp.
- No. 9339—November 23, 1936—2½ pp.
- No. 9343—November 23, 1936—2½ pp.
- No. 9345—November 24, 1936—2½ pp.
- No. 9354—December 7, 1936—3½ pp.
- No. 9392—January 13, 1937—2 pp.
- No. 9413—January 29, 1937—2½ pp.
- No. 9430—February 15, 1937—2 pp.
- No. 9552—July 7, 1937—2½ pp.
- No. 9558—July 12, 1937—2½ pp.

- No. 9568—July 20, 1937—4½ pp.
No. 9579—August 2, 1937—3½ pp.
No. 9581—August 3, 1937—3½ pp.
No. 9584—August 5, 1937—2½ pp.
No. 9585—August 6, 1937—3½ pp.
No. 9631—October 7, 1937—2½ pp.
No. 9636—October 9, 1937—2 pp.
No. 9648—October 18, 1937—2½ pp.
No. 9649—October 18, 1937—5½ pp.
No. 9650—October 18, 1937—3 pp.
No. 9651—October 18, 1937—2½ pp.
No. 9652—October 18, 1937—3½ pp.
No. 9653—October 18, 1937—2½ pp.
No. 9654—October 18, 1937—2½ pp.
No. 9658—October 19, 1937—4½ pp.
No. 9659—October 19, 1937—4½ pp.
No. 9663—October 20, 1937—2 pp.
No. 9678—October 29, 1937—4 pp.
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LIABILITY FOR INJURIES CAUSED BY AN ALLEGEDLY DEFECTIVE STREET

(No. 9433—Chairman, Committee on Finance—E.L.M.—February 18, 1937—3½ pp.)

The City is not liable for injuries caused to a person by an allegedly defective street when it has exercised reasonable care and diligence to keep the street reasonably safe and when the claimant has not shown that he was exercising due care and caution for his own safety at the time of the accident. The mere happening of an accident raises no presumption that it was caused by negligence.

- Citations: Chicago v. Bixby, 84 Ill 82 (1876).
Village of Mansfield v. Moore, 124 Ill 133 (1888).
City of Gibson v. Murray, 216 Ill 589 (1905).
Huff v. Illinois Central RR., 362 Ill 95 (1936).
Spring Valley Coal Co. v. Buzis, 213 Ill 341 (1905).
White v. City of Belleville, 284 Ill App 322 (1936).
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Opinion No. 9391 (2½ pp.) of January 13, 1937, and Opinion No. 9415 (2½ pp.) of January 29, 1937, both to the Chairman of the Committee on Finance, hold substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY STREET DEFECT

(No. 9091—Chairman, Committee on Finance—E.L.M.—March 13, 1936—3½ pp.)

The City is liable for injury or damage by a street which it failed to keep in a reasonably safe condition for the travelling public.

Citations: Simon v. Chicago, 279 Ill App 80 (1935).
City of Joliet v. Conway, 119 Ill 489 (1887).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

- No. 9006—January 8, 1936—3½ pp.
 - No. 9028—January 28, 1936—2 pp.
 - No. 9050—February 13, 1936—2½ pp.
 - No. 9089—March 11, 1936—3 pp.
 - No. 9096—March 18, 1936—2½ pp.
 - No. 9109—March 30, 1936—2½ pp.
 - No. 9134—April 21, 1936—3 pp.
 - No. 9164—May 18, 1936—3½ pp.
 - No. 9207—June 29, 1936—4 pp.
 - No. 9211—July 1, 1936—3½ pp.
 - No. 9286—September 17, 1936—2½ pp.
 - No. 9304—October 9, 1936—2½ pp.
 - No. 9341—November 23, 1936—3 pp.
 - No. 9387—December 31, 1936—2½ pp.
 - No. 9464—March 27, 1937—3 pp.
 - No. 9478—April 3, 1937—2 pp.
 - No. 9572—July 26, 1937—2½ pp.
 - No. 9599—August 19, 1937—3½ pp.
 - No. 9647—October 18, 1937—2½ pp.
 - No. 9668—October 23, 1937—2½ pp.
 - No. 9669—October 25, 1937—4 pp.
 - No. 9674—October 26, 1937—3 pp.
 - No. 9708—November 22, 1937—2½ pp.
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LIABILITY FOR INJURY ON STREET AND SIDEWALK UNDER REPAIR

(No. 9724—Chairman, Committee on Finance—E.L.M.—December 11, 1937—5 pp.)

The City is not liable for injuries suffered by a person on planking laid across a hole in a sidewalk in front of a building

that was being wrecked and along a street that was being widened and reconstructed, when the person was negligent. Both projects, the reconstruction of the street and the razing of the building, created conditions that made the street unfit and unsafe for public travel, and the obviousness of the projects constituted notice to the public. By traversing the torn-up street the person assumed the risk of personal injury.

LIABILITY FOR DAMAGE BY STREET REPAIRING MACHINE

(No. 9431—Chairman, Committee on Finance—E.L.M.—February 18, 1937—2½ pp.)

The City is liable for damage caused to a store window by City employees operating an air compressor used for repairing streets when those employees failed to exercise reasonable care to protect adjacent property.

Opinion No. 9702 (2 pp.) of November 13, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR NEGLIGENT OPERATION OF STEAMROLLER

(No. 9707—Chairman, Committee on Finance—E.L.M.—November 22, 1937—2½ pp.)

The City is liable for injury or damage to persons or property resulting from the negligence of its officers, agents, or employees in the operation of a steamroller while repairing streets.

Citations: City of Elgin v. Thompson, 98 Ill App 358 (1902).
McMulkin v. Chicago, 92 Ill App 331 (1901).

Opinion No. 9279 (2 pp.) of September 14, 1936, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY WPA STREET LABORERS

(No. 9479—Chairman, Committee on Finance—E.L.M.—April 5, 1937—2½ pp.)

The City is liable for damage caused by WPA laborers employed by the City on its streets when the City did not exercise reasonable care to protect adjacent property.

**LIABILITY FOR DAMAGE BY STREET UNDER
RECONSTRUCTION BY STATE**

(No. 9152—Chairman, Committee on Finance—E.L.M.—May 7, 1936—2 pp.)

The City is not liable for damage caused to an automobile by excavations in a street under reconstruction when that street was not properly barricaded or protected by warning signals, and when the reconstruction work was being done under contract by the state of Illinois under the supervision of the State highway department.

**LIABILITY FOR INJURIES BY SLIGHT DEPRESSION
IN SIDEWALK**

(No. 9174—Chairman, Committee on Finance—E.L.M.—May 22, 1936—2½ pp.)

The City is not liable for injuries to a person who fell because of a slight depression in the sidewalk, for the courts have held that a slight depression or defect in a sidewalk or street cannot fairly be held to indicate failure on the part of the City to keep its sidewalks or streets reasonably safe.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9175—May 22, 1936—3 pp.

No. 9176—May 22, 1936—3 pp.

No. 9193—June 5, 1936—3 pp.

- No. 9238—July 20, 1936—3½ pp.
No. 9251—August 3, 1936—4½ pp.
No. 9252—August 4, 1936—3½ pp.
No. 9293—September 23, 1936—7½ pp.
No. 9620—September 20, 1937—2½ pp.
No. 9621—September 21, 1937—4½ pp.
No. 9632—October 7, 1937—3½ pp.
No. 9638—October 13, 1937—5 pp.
No. 9643—October 16, 1937—2½ pp.
No. 9656—October 18, 1937—2½ pp.
No. 9657—October 18, 1937—4½ pp.
No. 9696—November 5, 1937—3½ pp.
No. 9709—November 22, 1937—3 pp.
No. 9711—November 23, 1937—6½ pp. .
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LIABILITY FOR STREET DEPRESSION

(No. 9422—Chairman, Committee on Finance—E.L.M.—February 5, 1937—2½ pp.)

The City is liable for injuries suffered by a person who fell because of a street depression of eight to ten inches, which the City had failed to fill properly, and which had existed for eight or nine months.

Citation: *Simon v. Chicago*, 279 Ill App 80 (1935).

LIABILITY FOR INJURY BY SEWER MANHOLE

(No. 8994—Chairman, Committee on Finance—E.L.M.—January 3, 1936—2½ pp.)

The City is not liable for damage or injury caused by a sewer manhole when it had no notice, either actual or implied, of any defect in the street pavement. The City is bound to use reasonable care to keep its streets in a reasonably safe condition, but it is not an insurer of the safe conditions of its streets and is not liable for damage or injury that could not have been prevented by the exercise of reasonable care and vigilance.

Citation: *City of Joliet v. Seward*, 86 Ill 402 (1877).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the preceding opinion.

- No. 9014—January 14, 1936—1½ pp.
- No. 9022—January 22, 1936—2 pp.
- No. 9031—January 31, 1936—2 pp.
- No. 9034—February 5, 1936—2 pp.
- No. 9064—February 20, 1936—2½ pp.
- No. 9231—July 14, 1936—3½ pp.
- No. 9382—December 30, 1936—2½ pp.
- No. 9511—April 29, 1937—2 pp.
- No. 9563—July 16, 1937—3 pp.
- No. 9642—October 16, 1937—2½ pp.
- No. 9731—December 22, 1937—3½ pp.

LIABILITY FOR INJURY BY OPEN MANHOLE

(No. 9385—Chairman, Committee on Finance—E.L.M.—December 30, 1936—3½ pp.)

The City is liable for injuries suffered by a person who fell through an open sewer manhole in a public street when its employees failed to exercise ordinary care to barricade and light the sewer hole or to place a man at the hole to warn traffic until a barricade or solid cover could be placed over it.

DAMAGE BY DIRT REFILL IN STREET

(No. 9087—Chairman, Committee on Finance—E.L.M.—March 6, 1936—3½ pp.)

The City is not liable for damage alleged to have been caused to an automobile passing over a dirt refill in a street when that refill was made in the standard, approved, scientific manner of repairing streets preparatory to relaying the pavement, and the street was in a reasonably safe condition for the use of persons who were exercising due care for their own safety.

Citation: Simon v. Chicago, 279 Ill App 80 [1935].

LIABILITY FOR DAMAGE BY SINKING OF TEMPORARY PAVEMENT

(No. 9432—Chairman, Committee on Finance—E.L.M.—February 18, 1937—4 pp.)

The City is not liable for damage allegedly sustained by a heavily loaded truck which broke through a temporary street pavement when the City exercised reasonable care to repair the street and to refill the excavation with earth so that it was in a reasonably safe condition for the use of persons who were exercising due care for their own safety.

CITY LIABILITY FOR STREET OPENING

(No. 9394—Chairman, Committee on Finance—E.L.M.—January 13, 1937—4½ pp.)

The City is not liable for damage to an automobile alleged to have been caused by an opening in a street for repairs to a water main when the City took every possible precaution to protect the opening.

Citation: *Simon v. Chicago*, 279 Ill App 80 (1935).

Opinion No. 9420 (2½ pp.) of February 1, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

DAMAGE BY STREET BARRICADE

(No. 9497—Chairman, Committee on Finance—E.L.M.—April 19, 1937—3½ pp.)

The City is not liable for damage to an automobile which crashed into a street barricade when the City kept the barricade

lighted with warning lights, and replaced the warning lights as rapidly as possible following their smashing by careless motorists.

Opinion No. 9097 (2½ pp.) of March 18, 1936, and Opinion No. 9212 (2½ pp.) of July 1, 1936, both to the Chairman of the Committee on Finance, hold substantially the same as the above opinion.

LIABILITY FOR INJURIES CAUSED BY CART OBSTRUCTING ALLEY

(No. 9030—Chairman, Committee on Finance—E.L.M.—January 31, 1936—2 pp.)

The permitting of a street cleaning cart to remain overnight in a public alley, where it was an obstruction, constituted negligence on the part of the City employee charged with the duty of storing the cart in a safe place when not in use, and the City is liable for injuries suffered by a person bumping into that cart at night.

LIABILITY FOR DAMAGE TO COAL HOLE COVER

(No. 9463—City Architect—F.L.K.—March 22, 1937— 1 p.)

A trucking company, whose truck drove over a bar grate coal hole cover in an alley adjoining the quarters of a City hook and ladder company and damaged the cover, is not liable for that damage as the driver of the truck had a right to drive into the alley and to expect no defect in the cover. It should be replaced at the expense of the City.

LIABILITY FOR INJURIES BY STREET CLEANER

(No. 8996a—Chairman, Committee on Finance—E.L.M.—January 4, 1936—3 pp.)

The City is not liable for injuries suffered by a person who allegedly fell over a street cleaner's broom when no facts are presented upon which a charge of negligence against the City can be predicated, and when it is not proved that the claimant was free from negligence in the matter herself and exercising due care and caution for her own safety.

OBSTRUCTION ON SIDEWALK OR STREET

(No. 9622—Chairman, Committee on Finance—E.L.M.—September 27, 1937—4 pp.)

The City is not liable for an injury alleged to have been caused by some obstruction on a sidewalk or street which the City's employees did not place there and of which the City had no actual or implied notice. The City is not an insurer against accidents, and it is not required to foresee and provide against every possible danger of accident that may occur on its streets and other public ways. It is only required to keep its streets and public ways in a reasonably safe condition for the accommodation of the public who use them.

Citations: Chicago v. Bixby, 84 Ill 82 (1876).
Village of Mansfield v. Moore, 124 Ill 133 (1888).
City of Gibson v. Murray, 216 Ill 589 (1905).
Huff v. Illinois Central RR., 362 Ill 95 (1936).
Spring Valley Coal Co. v. Buzis, 213 Ill 341 (1905).
White v. City of Belleville, 284 Ill App 322 (1936).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9331—November 16, 1936—2 pp.

No. 9660—October 19, 1937—2½ pp.

No. 9671—October 25, 1937—4 pp.

LIABILITY FOR DAMAGE BY STREET LAMP

(No. 9577—*Chairman, Committee on Finance—E.L.M.—July 27, 1937—21½ pp.*)

The City is not liable for damage to an automobile caused by a City electric light fixture dropping on it when the City had no notice of any defect in its street lighting equipment and no circumstances existed which would imply notice to the City. The City is bound to use reasonable care to keep its streets in a reasonably safe condition, but it is not liable for injuries that could not have been prevented by the exercise of reasonable care and vigilance.

LIABILITY FOR DAMAGE BY SAFETY ISLAND

(No. 9035—*Chairman, Committee on Finance—E.L.M.—February 5, 1936—2 pp.*)

The City is not liable for damage to an automobile which collided with a safety island which was lighted and in clear view. The City is bound to keep its streets in a reasonably safe condition and may be held liable for failure to do so, but before such liability may attach to the City it must be shown that the City authorities had actual notice of the defective condition or that such a state of circumstances existed that notice to the City would be implied.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9187—May 27, 1936—3 pp.

No. 9525—May 27, 1937—5 pp.

No. 9526—May 27, 1937—5½ pp.

No. 9527—May 27, 1937—5½ pp.

LIABILITY FOR REPLACEMENT OF CANOPY BECAUSE OF STREET WIDENING

(No. 9589—*Chairman, Committee on Finance—E.L.M.—August 9, 1937—2 pp.*)

The City is not liable for the expense of relocating or replacing a canopy necessitated by the widening of a street.

The City may grant to individuals and corporations the privilege of occupying its streets and public ways for lawful purposes, such as the construction and maintenance of a canopy, but the privilege is revocable at will and held only in subordination to the superior rights of the public. When the public use requires the space occupied in a street by the grantee of such a privilege, the grantee must yield to the necessities of the public and has no cause of action against the City for reimbursement on account of the yielding of its privilege.

LIABILITY FOR INJURY BY CHAIN PROTECTING PARKWAY

(No. 9557—*Chairman, Committee on Finance—E.L.M.—July 12, 1937—4½ pp.*)

The City is not liable for injuries suffered by a person who walked across a parkway and tripped over a chain stretched along the parkway to protect the grass, as the City maintained ample sidewalk and crosswalk space in safe condition at that point, the street was properly and adequately lighted, parkways are neither designed nor intended for pedestrian or vehicular travel, and the claimant does not appear to have been exercising reasonable and ordinary care and prudence for her own safety.

Citation: *White v. City of Belleville*, 284 Ill App 322 (1936).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper, correspondence, invoice, and snapshots in the claim of Lorraine H. Sunderland * * * * for personal injuries. You request an opinion as to the liability of the City in the premises.

Miss Sunderland submits the following statement of her claim:

"On December 10, 1936, at 9:00 P. M., Miss Lorraine H. Sunderland of 8743 South Racine Avenue, Chicago, Illinois, while crossing the grass plot in front of the premises known as 1354-58 West 95th Street, was thrown into the street when she came in contact with a chain stretched from a telephone post in the corner to a concrete post in said plot. The corner is dark, the chain inconspicuous because it was painted a dark color. She was not familiar with said condition and happened to be there because she had just made a purchase from the drug store on said corner.

INJURIES

Report of Dr. Joseph P. Graf, Physician and Surgeon:

Injuries to left chest and ribs, 7th, 8th, and 9th, possible fracture.

Laceration, left shin bone, 4 to 6 inches in length.

Broken teeth.

Left central eighth lateral.

Lips, upper and lower lacerated, and bruised gums, cut and bruised.

Right hand badly swollen, bruised, discolored and sprained little finger, 1st and 3rd joint.

Left knee black and blue, swollen.

Report of Dr. R. E. Umbenhaur, Dentist:

Treatments for laceration and contusion.

Surgical removal of two teeth.

Four tooth temporary porcelain bridge.

Four tooth permanent porcelain bridge.

"The injuries sustained are permanent, i. e. loss of teeth and large scar on leg.

DAMAGES

Doctor bill	\$ 39.00
Dentist bill	475.00
Permanent injuries sustained	2,500.00
Total	<u>\$3,034.00"</u>

The Division of Investigation of the City Law department reports that after an intensive investigation of this alleged accident it was unable to find any witness to the occurrence described by Miss Sunderland. It reports the lighting conditions of the corner as very good, and the sidewalk and crosswalks in excellent condition at the time Miss Sunderland complains of. There is no police record of the alleged accident. The Law department investigator who interviewed Miss Sunderland states that from her story he gathered the following facts: that when she came out

of the drug store, she ignored the sidewalk and crosswalk, and to save time, dashed diagonally across the grass parkway between the street curb and the sidewalk, and tripped over the chain strung along the curb side for the purpose of protecting the parkway from trampling feet for which sidewalks and crosswalks were provided. The investigator also reports the statement of the owner of the drug store as follows:

"Talked to the elderly pharmacist who is the proprietor of the East Beverly Pharmacy at this corner to-wit: 1358 W. 95th Street. His wife was also present. They state:

"Yes, we remember the girl. She came in here for some medicine for a man who was bleeding. She told us the man was bleeding badly and she wanted medicine to stop the flow of blood. We gave her some medicine. She was all right at the time. Shortly after she came back and told us she fell and hurt herself. We gave her some mouth wash. She was here by herself. We did not see the accident. She may have come here in a car. We did not see. We were engaged here and paid no attention. For all we may know, someone may have punched her in the jaw or beat her up. The place out here is well lighted at night. Our electric sign is also lighted here at night. That corner street lamp throws a good light.'"

A municipal corporation does not insure the citizen against damage resulting from the defective condition of its streets and sidewalks. Its obligation and duty in such respect is measured by the exercise of reasonable care and diligence. Liability can only be predicated on the City's neglect or misconduct:

"It is the settled law of this State that a city is not an insurer against accidents; that it is not required to foresee and provide against every possible danger or accident that may occur but is only required to keep its streets and sidewalks in a reasonably safe condition for the accommodation of the public who use them. (Citations.) The mere happening of the accident raises no presumption that it was caused by negligence."
(*White v. City of Belleville*, 284 Ill App 322.)

It is also well settled in this State that a person cannot recover damages for an injury resulting from the negligence of another unless the claimant be free from negligence in the matter himself and able to show that at the time of the injury he was in the exercise of due care and caution for his own safety.

It does not appear from the investigation of this occurrence that the injuries complained of by Miss Sunderland resulted from negligence on the part of the city of Chicago. It does appear that the City maintained ample sidewalk and crosswalk space in a safe condition for the use of the public. It further appears that the street corner in question was and is properly and adequately lighted.

A person traveling upon a sidewalk of the City which is used by the public has a right to act upon the presumption that such sidewalk is in a reasonably safe condition and free from dangerous obstructions, but it is his

duty to exercise reasonable and ordinary care and prudence to avoid danger. Parkways in the public streets may be found throughout the City between the sidewalk and the curb usually surrounded or partly surrounded by wire, chains, hedges, or fenced in in some manner to protect the grass or flowers that are being coaxed to grow therein and such parkways, as is generally known, are neither designed or intended for pedestrian or vehicular travel; so when a person chooses to race across a parkway rather than make use of the walks provided by the City, surely his duty to exercise care and prudence to avoid danger is no less than when using the sidewalks.

The investigation of this claim indicates conclusively that the City cannot properly be charged with negligence in this instance, and it further indicates that the proximate cause of such injuries as were sustained by Miss Sunderland was her failure to exercise reasonable and ordinary care and prudence for her own safety. We are of the opinion, therefore, that the city of Chicago is not liable for the injury herein complained of.

LIABILITY FOR INJURY TO PERSON USING STREET INSTEAD OF SIDEWALK

(No. 9667—Chairman, Committee on Finance—E.L.M.—October 23, 1937—4 pp.)

The City is not liable for injuries suffered by a person who failed to exercise the due care and caution for his own safety that an ordinarily prudent person would have exercised by using a good sidewalk which was available instead of a roadway reasonably safe for vehicular traffic but defective for pedestrian travel.

Citations: Chicago v. Bixby, 84 Ill 82 (1876).
Village of Mansfield v. Moore, 124 Ill 133 (1888).
City of Gibson v. Murray, 216 Ill 589 (1905).
Huff v. Illinois Central RR., 362 Ill 95 (1936).
Spring Valley Coal Co. v. Buzis, 213 Ill 341 (1905).
White v. City of Belleville, 284 Ill App 322 (1936).

CITY LIABILITY FOR ALLEGED DEFECTIVE SIDEWALK

(No. 9414—Chairman, Committee on Finance—E.L.M.—January 29, 1937—2½ pp.)

The City is not liable for injuries suffered from an alleged sidewalk defect when no charge of negligence against the City

can be predicated. A claimant cannot recover damages for any injury resulting from the alleged negligence of another unless he shows that at the time of the injury he exercised due care and caution for his own safety.

Citation: *White v. City of Belleville*, 284 Ill App 322 (1936).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9393—January 13, 1937—2 pp.

No. 9401—January 18, 1937—3½ pp.

No. 9403—January 18, 1937—5½ pp.

No. 9405—January 20, 1937—3½ pp.

LIABILITY FOR INJURIES CAUSED BY SIDEWALK DEFECT

(No. 9054—Chairman, Committee on Finance—E.L.M.—February 18, 1936—2½ pp.)

The City is liable for injuries suffered by a person who fell because of a defect in a sidewalk which has existed long enough for the City to be charged with constructive notice of it, and for the City to be charged with failure to exercise the degree of care required of it to keep the sidewalk in a reasonably safe condition.

Citation: *Simon v. Chicago*, 279 Ill App 80 (1935).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9066—February 24, 1936—3½ pp.

No. 9092—March 16, 1936—3 pp.

No. 9136—April 28, 1936—2½ pp.

No. 9139—April 30, 1936—2½ pp.

No. 9155—May 9, 1936—3½ pp.

No. 9185—May 27, 1936—2½ pp.

No. 9186—May 27, 1936—3½ pp.

No. 9191—June 3, 1936—3 pp.

No. 9246—July 27, 1936—3 pp.

No. 9259—August 6, 1936—2 pp.

No. 9314—September 19, 1936—2½ pp.

No. 9356—December 8, 1936—2½ pp.

No. 9381—December 28, 1936—2½ pp.

- No. 9398—January 14, 1937—3 pp.
No. 9534—June 4, 1937—2 pp.
No. 9555—July 8, 1937—3½ pp.
No. 9562—July 16, 1937—2½ pp.
No. 9564—July 19, 1937—3½ pp.
No. 9617—September 15, 1937—2 pp.
No. 9618—September 16, 1937—3½ pp.
No. 9623—September 28, 1937—2½ pp.
No. 9630—October 6, 1937—3½ pp.
No. 9661—October 20, 1937—2½ pp.
No. 9662—October 20, 1937—3½ pp.
No. 9670—October 25, 1937—3 pp.
No. 9676—October 27, 1937—4½ pp.
No. 9684—November 1, 1937—3 pp.
No. 9712—November 29, 1937—4 pp.

LIABILITY FOR INJURY BY SIDEWALK DEFECT

(No. 9236—*Chairman, Committee on Finance—E.L.M.—July 20, 1936—2½ pp.*)

The City is not liable for injuries suffered by a person falling on an allegedly defective sidewalk when no facts are submitted which show how the alleged injury occurred, nothing is offered that would indicate that the claimant was exercising due care and caution for his own safety, and reports show that the sidewalk complained of was in a reasonably safe condition.

The City is bound to use reasonable care to keep its sidewalks in a reasonably safe condition, and is liable for damage or injury resulting from its neglect or failure to use such reasonable care, but it is not an insurer of the safe condition of its sidewalks, and is not liable for damage or injury that could not have been prevented by the exercise of reasonable care and vigilance.

- Citations: Chicago v. Bixby, 84 Ill 82 (1876).
Village of Mansfield v. Moore, 124 Ill 133 (1888).
City of Gibson v. Murray, 216 Ill 589 (1905).
Huff v. Illinois Central RR., 362 Ill 95 (1936).
Spring Valley Coal Co. v. Buzis, 213 Ill 341 (1905).
White v. City of Belleville, 284 Ill App 322 (1936).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the preceding opinion.

- No. 9075—February 27, 1936—2½ pp.
 - No. 9079—March 3, 1936—3 pp.
 - No. 9081—March 4, 1936—2 pp.
 - No. 9083—March 5, 1936—2½ pp.
 - No. 9084—March 5, 1936—2½ pp.
 - No. 9085—March 6, 1936—2½ pp.
 - No. 9093—March 16, 1936—2½ pp.
 - No. 9098—March 16, 1936—2½ pp.
 - No. 9243—July 22, 1936—3 pp.
 - No. 9282—September 15, 1936—2½ pp.
 - No. 9319—October 26, 1936—4 pp.
 - No. 9338—November 20, 1936—3½ pp.
 - No. 9360—December 9, 1936—3½ pp.
 - No. 9363—December 10, 1936—4½ pp.
 - No. 9384—December 30, 1936—2½ pp.
 - No. 9513—April 30, 1937—3 pp.
 - No. 9553—July 7, 1937—2 pp.
 - No. 9619—September 20, 1937—5 pp.
 - No. 9624—October 1, 1937—2½ pp.
 - No. 9625—October 1, 1937—3½ pp.
 - No. 9626—October 1, 1937—2½ pp.
 - No. 9627—October 2, 1937—3 pp.
 - No. 9629—October 5, 1937—3½ pp.
 - No. 9655—October 18, 1937—3 pp.
 - No. 9675—October 26, 1937—2½ pp.
 - No. 9677—October 27, 1937—3½ pp.
 - No. 9683—October 30, 1937—4 pp.
 - No. 9727—December 15, 1937—3½ pp.
 - No. 9738—December 30, 1937—3 pp.
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LIABILITY FOR INJURIES BY DEFECTIVE SIDEWALK— PROOF OF INJURIES

(No. 9041—Chairman, Committee on Finance—E.L.M.—February 4, 1936—3½ pp.)

Although the City has failed to use reasonable care to keep a sidewalk reasonably safe for travel, and the City is therefore liable for any injuries caused by it, the claimant must show that he was actually injured as a result of the defective condition of the sidewalk and that he was exercising due care for his own safety when so injured.

Citations: Simon v. Chicago, 279 Ill App 84 (1935).
Hogan v. Chicago, 168 Ill 551 (1897).

LIABILITY FOR INJURIES BY ICY AND BROKEN SIDEWALK

(No. 9007—*Chairman, Committee on Finance—E.L.M.—January 10, 1936—3 pp.*)

The City is not liable for injuries suffered by a person who fell on an icy and broken sidewalk when the icy condition of the walk was general, when the City had no notice, actual or constructive, of the defective condition of the sidewalk, and when the injured person was presumed to have known of the defect and should have exercised due care and caution for his own safety at the time of the accident.

Citations: *Graham v. Chicago*, 346 Ill 638 (1932).
Haymes v. Chicago, 279 Ill App 481 (1935).

Opinion No. 9061 (2½ pp.) of January 10, 1936, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR INJURIES FROM ICY STREETS

(No. 9199—*Chairman, Committee on Finance—E.L.M.—June 15, 1937—2 pp.*)

The City is not liable for injuries resulting from a general slippery condition of its streets and sidewalks due to the presence of ice and snow which have accumulated as the result of natural causes.

Citations: *Graham v. Chicago*, 346 Ill 638 (1932).
Haymes v. Chicago, 279 Ill App 481 (1935).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9065—February 20, 1936—3½ pp.
No. 9117—April 8, 1936—2½ pp.
No. 9157—May 11, 1936—2½ pp.
No. 9168—May 19, 1936—2½ pp.
No. 9272—September 10, 1936—2½ pp.
No. 9287—September 17, 1936—2½ pp.
No. 9586—August 6, 1937—4 pp.

LIABILITY FOR CROSSWALK INJURY

(No. 9233—*Chairman, Committee on Finance—E.L.M.—July 15, 1936—21½ pp.*)

The City is not liable for injuries alleged to have been caused by a defective crosswalk when there is no evidence that the City failed to exercise reasonable care to keep the crosswalk in a reasonably safe condition. The mere fact that an injury has been sustained because of some alleged defect in a street does not of itself make the City liable. It must be shown that the City had actual notice of the defect or that such a state of circumstances existed that notice to the City would be implied.

Citations: Chicago v. Bixby, 84 Ill 82 (1876).
Village of Mansfield v. Moore, 124 Ill 133 (1888).
City of Gibson v. Murray, 216 Ill 589 (1905).
Huff v. Illinois Central RR., 362 Ill 95 (1936).
Spring Valley Coal Co. v. Buzis, 213 Ill 341 (1905).
White v. City of Belleville, 284 Ill App 322 (1936).

**LIABILITY FOR INJURY BY DEFECTIVE ALLEY
CROSSWALK**

(No. 9561—*Chairman, Committee on Finance—E.L.M.—July 16, 1937—7 pp.*)

The City is liable for injuries suffered by a person falling on an alley crosswalk which has been in a defective condition for a period of time of such duration that the City must be presumed to have had notice of it.

Citation: Simon v. Chicago, 279 Ill App 80 (1935).

LIABILITY FOR INJURY ON CURB STEP

(No. 8997—*Chairman, Committee on Finance—E.L.M.—January 6, 1936—3½ pp.*)

The City is not liable for injury to a person who fell on a step between the street and sidewalk curb when no charge is made

of lack of care or skill in the construction and maintenance of the street and sidewalk.

The City acts judicially when it selects and adopts a plan for the construction of a public improvement, and it cannot be held liable in damages for the manner in which it exercises its discretionary powers of a judicial character, if in good faith. However, when such a plan is adopted, the City is liable for any damages incurred because of failure to carry out the plan in a reasonably safe and skillful manner.

Citation: *Chicago v. Seben*, 165 Ill 371 (1897).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9072—February 26, 1936—3½ pp.

No. 9149—May 6, 1936—2½ pp.

CITY LIABILITY FOR AN ALLEGED DEFECTIVE CURBING

(No. 9409—Chairman, Committee on Finance—E.L.M.—January 27, 1937—3 pp.)

The City is not liable for injuries caused by an allegedly defective curbing unless it is shown that the City has failed to exercise reasonable care to keep the curbing in a reasonably safe condition and that the claimant was exercising due care and caution.

LIABILITY FOR INJURY BY CURB

(No. 9226—Chairman, Committee on Finance—E.L.M.—July 9, 1936—4 pp.)

The City is not liable for injuries sustained by a person who fell on a curb when it does not appear that the City was negligent in maintaining the curb in a reasonably safe condition, and it seems that the claimant failed to exercise such care and cau-

tion for her own safety as an ordinarily prudent person would have exercised when crossing the curb.

Citation: *White v. City of Belleville*, 284 Ill App 322 (1936).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9070—February 25, 1936—2½ pp.

No. 9196—June 11, 1936—2½ pp.

No. 9227—July 9, 1936—4 pp.

No. 9241—July 21, 1936—3 pp.

LIABILITY FOR INJURY BY CONCEALED DEFECTIVE CURBSTONE

(No. 9077—Chairman, Committee on Finance—E.L.M.—March 2, 1936—2½ pp.)

The City is liable for injuries suffered by a person who fell because of a curbstone which was worn away and concealed by grass and weeds, since the dangerous and defective condition of the curbstone existed for a period of time of such duration that it constituted constructive notice to the City.

(2) Bridges

LIABILITY FOR OPERATION OF BRIDGE

(No. 9026—Chairman, Committee on Finance—E.L.M.—January 24, 1936—2½ pp.)

Although a bridge is a part of the street which the City is bound to use reasonable care to keep in a reasonably safe condition, the City is not liable for damage to an automobile on a bridge when its employees exercised proper care and skill in the operation of the bridge.

Citation: *Gathman v. Chicago*, 236 Ill 9 (1908).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper, bill, and correspondence in the claim of Charles P. Thompson * * * * for damages to automobile in the sum of \$15.45. You request an opinion as to the liability of the City in the premises.

Mr. Thompson alleges that on September 28, 1935, he was driving west in Monroe street and while on the bridge the gates were lowered locking him in and to avoid more serious injury which would result from being on the bridge while it was being raised he backed his automobile through the gates that were lowered to halt west-bound traffic.

Reports from the Commissioner of Public Works, the Harbor Master and the bridge tender, all hereto attached, aver that gates on the west end of the bridge in the lane for west bound traffic were not lowered at the time and that there was nothing to prevent Mr. Thompson continuing on his way across the bridge; that the only gates lowered on the west end of the bridge at that time were the gates in the south lane of the bridge which prevented only east bound traffic from crossing the bridge at the time. In his report the Commissioner of Public Works says:

"The procedure of the bridgetenders in this instance is the regular and correct procedure used by all bridetenders in preparing to open a bridge. The oncoming gate at each end is always first lowered to keep further traffic from coming into the bridge. Then as soon as the traffic on the bridge is off, the off-going gates are lowered. Mr. Thompson should have proceeded across the bridge and the bridgetender rightly assumed that he was going to do so as the off-going gate at the other end was still up in order to permit the automobile to clear the bridge.

Mr. Thompson became confused, evidently thinking that the bridge was going to be raised while he was still on it, and backed into the lowered east on-coming gate."

The principle is well established in this State that a municipality is bound to use reasonable care to keep its streets in a reasonably safe condition and can be held to respond in damages for injury to persons or property resulting from its failure to exercise such reasonable care. Such failure constitutes negligence.

Our Supreme Court has held that the bridge forms a part of the street (*Gathman v. City of Chicago*, 236 Ill 9). Therefore, the City is bound to use reasonable care and skill in the maintenance and operation of its bridges.

The reports of the Commissioner, the Harbor Master, and the bridge tender clearly indicate that proper care and skill were exercised in the operation of the Monroe street bridge at the time complained of, and we are of the opinion, therefore, that the city of Chicago is not liable for the injury to Mr. Thompson's automobile herein described.

LIABILITY FOR DAMAGE BY BRIDGE GATE

(No. 9250—*Chairman, Committee on Finance—E.L.M.—August 3, 1936—4½ pp.*)

The City is liable for damage to an automobile which collided with a bridge gate when the City's employees were negligent in not securely fastening the bolts holding the gate in an upright position so that it would resist a severe wind.

Citation: *Lehigh Valley Transportation Co. v. Chicago*, 237 Ill 581 (1909).

**LIABILITY FOR DAMAGE BY BRIDGE GATE LOWERED
FOR REPAIR**

(No. 9255—*Chairman, Committee on Finance—E.L.M.—August 5, 1936—1½ pp.*)

The City is not liable for damage to an automobile which collided with a bridge gate that had been lowered for a short period in the daylight to be repaired, as that lowering does not constitute negligence.

**LIABILITY FOR INJURY BY KNOTHOLE IN BRIDGE
PLANKING**

(No. 9495—*Chairman, Committee on Finance—E.L.M.—April 17, 1937—3½ pp.*)

The City is not liable for injuries caused to a person by a small knothole in the planking of a bridge, as the knothole comes within the classification of minor defects which the courts have ruled impose no duty upon the City to repair. The requirement that the City use reasonable care to keep its streets and sidewalks in a reasonably safe condition has never been construed to mean, and does not mean, that the City must keep its streets and sidewalks in perfect condition.

- Citations: *Gathman v. Chicago*, 236 Ill 9 (1908).
Chicago v. Bixby, 84 Ill 82 (1876).
Village of Mansfield v. Moore, 124 Ill 133 (1888).
City of Gibson v. Murray, 216 Ill 589 (1905).
Huff v. Illinois Central RR., 362 Ill 95 (1936).
Spring Valley Coal Co. v. Buzis, 213 Ill 341 (1905).
White v. City of Belleville, 284 Ill App 322 (1936).

OPINION OF FOREGOING SYNOPSIS

We have your letter and Council paper in the claim of Mrs. Mae O'Grady, * * * * for personal injuries. You request an opinion as to the liability of the City in the premises.

No statement of this claim is attached to your file. However, the Division of Investigation of the City Law department reports Mrs. O'Grady's statement of her accident as follows:

"On Sunday, June 28, 1936, while walking west on the north side of Madison street bridge, about a quarter ways across bridge, stepped in a hole and fell on my face, breaking my glasses, cutting my head and knees—spoiling my dress and gloves and shoes. Have been treating with Dr. Manniere, 1401 N. Dearborn street ever since."

Mrs. O'Grady does not fix any sum as her damage.

Bernard DeWitt, bridge tender, employed on the Madison street bridge at the time complained of, came to this office and stated that from time to time knotholes appear in the sidewalk planking of the bridge; that the walks are regularly inspected and replanked; that in addition to the regular inspection the bridge tenders watch for defects in the roadway and sidewalks of the bridge and report promptly when repairs are necessary; that the hole complained of by Mrs. O'Grady was a knothole of about one inch in diameter.

The principle is well established in this State that a municipal corporation is bound to use reasonable care to keep its streets in a reasonably safe condition and can be held to respond in damages for injury to persons or property resulting from its failure to exercise such reasonable care. Such failure constitutes negligence. Our Supreme Court has held that a bridge forms a part of the street. (*Gathman v. City of Chicago*, 236 Ill 9).

Municipalities are bound to use reasonable care to keep their streets in a reasonably safe condition and can be held to respond in damages for injury to persons or property resulting from their failure to exercise such reasonable care. Such failure constitutes negligence. However, it is equally well established that municipalities are not insurers of the safe condition of their streets and are not liable for injuries that could not have been prevented by the exercise of reasonable care and vigilance.

"Reasonable care to keep streets and sidewalks in a reasonably safe condition" has never been construed to mean, and does not mean that

municipalities are required to keep their streets and sidewalks in perfect condition. A municipal corporation does not insure the citizen against damage resulting from the defective condition of its streets. Its obligation and duty in such respect is measured by the exercise of reasonable care and diligence. Liability can only be predicated on the City's neglect or misconduct. The mere happening of the accident raises no presumption that it was caused by negligence. This principle of law has been consistently applied by our reviewing courts in a number of cases, among which are *City of Chicago v. Bixby*, 84 Ill 82; *Village of Mansfield v. Moore*, 124 Ill 133; *City of Gibson v. Murray*, 216 Ill 589; *Huff v. Illinois Central RR.*, 362 Ill 95; *Spring Valley Coal Co. v. Buzis*, 213 Ill 341; *White v. City of Belleville*, 284 Ill App 322.

It appears from the report of Bridge Tender Dewitt that from time to time small knotholes appear in the planking of the bridge which are so slight and inconsequential that they come within the classification of minor defects about which our reviewing courts have said that "the law did not impose a duty upon the city to repair such a minor defect." (*White v. City of Belleville*, 284 Ill App 322.) It further appears from the statement of Bridge Tender Dewitt that the City exercises reasonable care to keep the roadway and sidewalks of the Madison street bridge reasonably safe for travel.

No facts appear either from the claimant's statement or from our investigation upon which a charge of negligence against the City could be predicated, and we are of the opinion, therefore, that the city of Chicago is not liable for the injury to Mrs. O'Grady herein complained of.

* * * * *

Opinion No. 9412 (4 pp.) of January 28, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR INJURY BY DEFECTIVE BRIDGE WALK

(No. 9271—Chairman, Committee on Finance—E.L.M.—September 10, 1936—3 pp.)

The City is liable for injury to a person caused by a serious defect on a bridge walk when the defect existed over a period of time sufficient to constitute notice to the City. The City is bound to use the same reasonable care in the maintenance of its bridges as of its streets, for bridges are parts of the streets.

Citation: *Gathman v. Chicago*, 236 Ill 9 (1908).

DAMAGE TO STEAMSHIP COLLIDING WITH BRIDGE

(No. 9452—*Commissioner of Public Works—R.D.K.—March 9, 1937—1½ pp.*)

A claim against the City for damage to a steamship which collided with bridge may be established on the basis of negligence when the bridge was not raised to its maximum lift because the City's bridgetender incorrectly read his bridge elevator.

(3) Dangerous Trees**LIABILITY FOR DAMAGE BY DEFECTIVE TREE**

(No. 9475—*Chairman, Committee on Finance—E.L.M.—April 1, 1937—2 pp.*)

The City is not liable for injury or damage by a tree, unless the tree was in a defective or dangerous condition, and the City authorities had notice of that condition, or such a set of circumstances existed that notice to the City would be implied.

Citation: 18 Op. Corp. Coun. 941, 942.

Opinion No. 9421 (2½ pp.) of February 1, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY FALLING DECAYED TREE

(No. 9015—*Chairman, Committee on Finance—E.L.M.—January 14, 1936—2½ pp.*)

The City is liable for damage caused by a falling decayed tree when it had been notified of the dangerous condition of the tree within ample time to prevent the damage complained of, but failed to act to remove the tree.

Citation: City of Mt. Carmel v. Shaw, 155 Ill 37 (1895).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the preceding opinion.

No. 9276—September 14, 1936—2 pp.

No. 9332—November 16, 1936—2½ pp.

LIABILITY FOR DAMAGE WHEN REMOVING TREE

(No. 9509—Chairman, Committee on Finance—E.L.M.—April 29, 1937—1½ pp.)

The City is liable for damage caused by City employees removing a defective tree from the streets when they failed to exercise reasonable care and skill to protect adjacent property.

Opinion No. 9580 (2½ pp.) of August 3, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY FALLING TREE LIMB

(No. 9110—Chairman, Committee on Finance—E.L.M.—April 1, 1936—2½ pp.)

City employees trimming trees to protect the City's electric light wires were performing a corporate or private function of the City, and when those employees did not exercise reasonable care and skill in performing that work, the City is liable for the damage caused to an automobile by a falling limb.

LIABILITY FOR DAMAGE BY TREE BLOWN DOWN BY WIND

(No. 9311—Chairman, Committee on Finance—E.L.M.—October 15, 1936—3 pp.)

The City is not liable for damage by a tree blown down by the wind when it does not appear that the tree was defective, nor

if the tree was in a defective or dangerous condition, that the City had either actual or constructive notice of that condition.

Citation: City of Mt. Carmel v. Shaw, 155 Ill 37 (1895).
Jones v. Greensboro, 124 NC 310 (1899).

DAMAGE BY TREE UPROOTED BY STORM

(No. 9570—Chairman, Committee on Finance—E.L.M.—June 23, 1937—7 pp.)

The City is not liable for damage caused to an automobile by a tree which was uprooted by a storm, the storm being of such unusual force and violence and accompanied by wind of such a high velocity that the resulting injuries to property are properly classified as an "act of God".

Citations: City of Mt. Carmel v. Shaw, 155 Ill 37 (1895).
Wald v. Pittsburgh, Cincinnati, Chicago, and St. Louis RR., 162 Ill 545 (1896).
Swope v. City of Wichita, 141 Kan 388 (1935).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper, invoice, newspaper clippings, and correspondence in the claim of George Sommers * * * * for damage to automobile. You request an opinion as to the liability of the City in the premises.

Mr. Sommers submits the following statement of his claim:

"My wife and I and another couple were for a drive. The names of this couple are Mr. and Mrs. Robert Roback * * * * . I took them home and parked my car at 3455 N. Paulina Street and stopped in at this couple's home for a bite to eat when a storm arose about 8:30 p. m., on Sunday, Aug. 9, 1936. We had just gotten out of the car about one-half hour before when we heard a large crash nearby.

"Upon investigation, I found that a large tree standing between the curb and the sidewalk was uprooted by the storm and fell directly on my car, which was badly demolished.

"Someone called the Tribune reporters and they came out and took some pictures of it. About 1:30 a. m. August 10, 1936, the Fire department came out and cut away this tree.

"There were numerous reports by people in this vicinity, stating that this tree was reported several times and that it was a detriment to

lives of people passing by it. I did not know about the danger of this tree until after the accident when the people congregating about were talking of the condition of this tree.

"This tree measured a good two feet in diameter and was approximately 100 to 125 feet tall."

Attached is an itemized and receipted bill for repairs to the automobile in the sum of \$120.80. Also attached are newspaper clippings showing pictures of the fallen tree lying across the automobile. Each of the newspapers report that the violence of the storm *uprooted* the tree.

Mr. Sommers further submits the statements of two residents of the neighborhood to the effect that they notified the City that the tree should be removed in the interest of public safety. The statements follow. Mrs. Becker's is in the form of an affidavit.

"I telephoned the early part of last summer to the city hall in regard to a poplar which grew at 3453 N. Paulina St., and which I thought was necessary to remove before the storm uprooted it.

Respectfully,

Mrs. B. Becker."

Statement of D. Polizzotto:

"This is to certify that I. D. Polizzoto, a home owner, * * * reported to the proper city authorities (sic) about a tree at 3453 N. Paulina St. that was jeopardizing passerbys. The above notice was reported by telephone some time last March.

D. Polizzotto."

Alderman Edwin F. Meyer of the 45th ward submits the following statement in support of Mr. Summer's claim:

"I remember very distinctly on at least two occasions when I by telephone had 'phoned Mr. Coman of the Forestry Dept. in 1935 about November or December and again in about February of 1936, and my complaint then was that the people desired the tree removed because it was dangerous.

"We all know that I am frank in stating this letter (sic) that because of insufficient funds many dangerous trees have not been removed. And at the time this accident occurred, pictures of which have appeared in the Tribune I spoke to Ald. Arvey, outlining, in a partial way, my experience in removing dangerous trees, and I touched upon this particular damage which occurred and he suggested that I advise Sommers to have the car fixed and enter claim.

"I see no reason why this claim should not be paid and I urge that the Finance Committee act upon it at the next meeting so as to reimburse Sommers for the expense occurred (sic)."

Fred R. Thomason, Superintendent of Parks and Forestry, reports on the destruction of this tree as follows:

"Relative to the claim of George Sommers * * * regarding a tree that was blown down in a wind storm on August 9, 1936, at 3455 N. Paulina Street.

"I have checked our records for the last three years, and I do not find any record made on this Bureau to remove a tree at this address.

"I have checked our records and find that on this day, August 9, 1936, about 102 trees were blown down and uprooted from the parkways in the city of Chicago.

"At 3455 N. Paulina Street our foreman, A. Christopher, who removed this tree after it was uprooted believes that the tree was in good condition and was uprooted by the strong wind as pictures in the daily newspapers show."

It will be noted that Mr. Sommers attributes the injury to his auto to the storm, in the third paragraph of his letter, in which he says: "Upon investigation I found that a large tree standing between the curb and the sidewalk was *uprooted by the storm* and fell directly on my car, which was badly demolished." Also all newspaper clippings submitted by Mr. Sommers refer to the great violence of the storm which "*uprooted the tree.*" The *Chicago Tribune* of August 10, 1936, in describing the great violence of the storm, says: "At Cornelia avenue and Paulina street three large trees fell, one of them demolishing an automobile owned by George Sommers * * *." It will be further noted that Alderman Meyer and the two residents of the 3400 block in N. Paulina street state that they notified the proper City authorities that the tree was dangerous and requested its removal; that none of the three point to any defect in the tree or state the facts upon which they base the conclusion that the tree was dangerous; that the Superintendent of Parks and Forestry advises that inspection of the tree after it had fallen disclosed no defective condition; that the tree was sound and was uprooted by the violent windstorm of August 9, 1936.

A municipality is bound to use reasonable care to keep its streets reasonably safe and can be held to respond in damages for injury to persons or property resulting from its failure to exercise such reasonable care. Such failure constitutes negligence.

"Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them. * * *" (*City of Mt. Carmel v. Shaw*, 155 Ill 37, at page 43.)

The duty of the municipality to exercise reasonable care to keep its streets reasonably safe for public travel includes the safeguarding against injury from defective trees as well as pavements and sidewalks. However, the municipality does not insure the citizen against injury. Its obligation and duty in such respect is measured by the exercise of reasonable care and diligence. Liability can only be predicated on the City's negligence or misconduct and the fact that such negligence or misconduct was the proximate cause of the injury.

The fact seems to be undisputed that the tree in question was uprooted and felled by a storm of unusual violence accompanied by wind of extraordinary velocity. It is also well established in the country that "A loss or injury is due to the act of God, when it is occasioned exclusively by natural causes such as could not be prevented by human care, skill and foresight * * * ." (*Wald v. Pittsburgh, Cincinnati, Chicago, and St. Louis RR.*, 162 Ill 551). Consequently, no liability can attach to the municipal corporation where the facts indicate that the injury was due solely to an act of God.

"The loss was occasioned by *vis major*, to foresee or to guard against which defendant was not negligent, and consequently not liable for damages, nominal or otherwise. *Long v. Railroad Co.*, 147 Pa. St. 343." (*Wald v. Pittsburgh, Cincinnati, Chicago, and St. Louis RR.*, 162 Ill 545, at page 550.)

In a Kansas case where the plaintiff alleged that the tree in question had for several months prior to the injury been dead, rotted, and decayed, and the roots thereof were weak and of insufficient strength to support it in an upright position and withstand the pressure of the ordinary winds which prevailed in that locality, and that this dangerous and unsafe condition was known by the city, its officers, agents, servants, and employees, the court held:

"A city is not ordinarily liable for neglect to remove a tree from a parking after notice and examination thereof, unless there is some defect discovered or reasonably discovered therein, or reason found why it should be removed for public safety." [*Swope v. City of Wichita*, 141 Kan 388 (Syllabus.)]

After a careful examination of all the foregoing statements and the law applicable thereto, we find that on the night of August 9, 1936, an unusually violent windstorm swept the city of Chicago and that in the course of the storm 102 trees were uprooted and felled within the City; that among the 102 trees that were felled by said storm was the one at or near 3445 N. Paulina street which fell upon and damaged the automobile of the claimant; that the said storm was of such unusual force and violence and the accompanying wind of such high velocity that the resulting injuries to property are properly placed in the legal classification of an "act of God"; that the tree in question had been reported to the city of Chicago as dangerous with requests for its removal prior to August 9, 1936; that said tree was in fact a live, sound tree without serious defects and did not constitute a hazard to public safety in the street; that the proximate cause of the damage to the Sommers automobile was the uprooting and felling of the tree by the storm as described above; that the injury to the said automobile did not result from negligence on the part of the City, its officers, or employees. We are, therefore, of the opinion that the city of Chicago is not liable for the damage to his automobile complained of by George Sommers.

* * * * *

(4) *Water Works*

LIABILITY FOR INJURY OR DAMAGE IN CONSTRUCTION AND MAINTENANCE OF WATERMAINS

(No. 9688—*Chairman, Committee on Finance—E.L.M.—November 3, 1937—7 pp.*)

The ownership of water works, the construction and maintenance of water mains, and the furnishing of water by the City to its inhabitants for profit is an undertaking of a private corporate nature. The City is bound to exercise due care and skill in constructing and maintaining its water mains, but it is not liable for injury or damage to persons or property that could not have been prevented by the exercise of due care, skill, and vigilance. It is liable only when it or its employees have been negligent, or have failed to exercise reasonable care or skill in the construction or maintenance of its water mains.

Opinion No. 9583 (2½ pp.) of August 5, 1937, and Opinion No. 9644 (3½ pp.) of October 16, 1937, both to the Chairman of the Committee on Finance, hold substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY BREAK IN HYDRANT

(No. 9519—*Chairman, Committee on Finance—E.L.M.—May 14, 1937—4½ pp.*)

The City is not liable for damage caused by a break in a hydrant lead when there is nothing on which an assumption can be based that the City had knowledge that the break was impending, or that in the exercise of due care it would have known the break was impending, and when the City was not negligent nor dilatory in responding to the notice of the break and in shutting off the flow of water through it.

Citations: Simon v. City of New York, 143 NYS 1097 (1913).
Jenney v. City of Brooklyn, 24 NE 274 (1890).
Chicago v. Selz, Schwab and Co., 202 Ill 545 (1903).

LIABILITY FOR DAMAGE BY DEFECTIVE WATER METER

(No. 8992—Chairman, Committee on Finance—E.L.M.—January 2, 1936—3 pp.)

The City is bound to exercise due care and skill in constructing and maintaining its water works, but it is not an insurer of the safe condition of its water works, and consequently is not liable for damage caused by water leaking from a defective water meter that could not have been prevented by the exercise of due care and vigilance.

Citation: *City of Joliet v. Seward*, 86 Ill 402 (1877).

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 8993—January 2, 1936—3½ pp.

No. 9151—May 7, 1936—2 pp.

No. 9275—September 10, 1936—2 pp.

No. 9306—October 13, 1936—2½ pp.

No. 9565—July 19, 1937—4 pp.

LIABILITY FOR DAMAGE BY SPARKS FROM WATER BUREAU CRANE

(No. 9274—Chairman, Committee on Finance—E.L.M.—September 10, 1936—3 pp.)

The City is liable for damage to an awning caused by sparks which blew out of the exhaust pipe of a City crane excavating for the Water Pipe Extension division when the City's employees failed to exercise reasonable care and skill to protect adjacent property from the sparks emitted by the crane.

LIABILITY FOR DAMAGE BY BLASTING FOR WATER TUNNEL

(No. 8995—Chairman, Committee on Finance—E.L.M.—January 3, 1936—2½ pp.)

The City is not liable for damage to property alleged to have

been caused by blasting during the construction of a water tunnel when its employees used due care and skill.

Citation: City of Joliet v. Seward, 86 Ill 402 (1877).

LIABILITY FOR DAMAGE BY WATER BUREAU STONES THROWN THROUGH STORE WINDOW

(No. 9200—*Chairman, Committee on Finance—E.L.M.—June 15, 1936—1½ pp.*)

The City is not liable for damage to a store window by children who threw stones, left in front of the store by City Water bureau workmen, through the window as there was no negligence or misconduct by its workmen. The City is not an insurer of private property against damage by anyone who may walk in its streets.

Opinion No. 9330 (4 pp.) of November 12, 1936, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR EXPENSE OF RELOCATING PUBLIC UTILITY CONDUIT

(No. 9046—*Chairman, Committee on Finance—E.L.M.—February 10, 1936—5½ pp.*)

The City is not liable to the Postal Telegraph Cable company for expenses it incurred in relocating a conduit line to make way for a new water main, as the City may require individuals and corporations to relocate or remove their equipment from the City streets at their own expense whenever the space so occupied is needed for municipally owned facilities maintained for the benefit and convenience of its inhabitants and the general public.

The public has prior and superior rights in the use of the streets, and any privileges granted to private persons or corporations in the use of the streets must yield to the necessities

of the public as determined by its duly constituted municipal authorities.

Citations:

Cases: National Water Works Co. v. City of Kansas, 28 Fed 921 (1886).
 Sears v. Chicago, 247 Ill 204 (1910).
 City of San Antonio v. San Antonio Street Ry., 15 Texas Civ App 1 (1896).
 Anderson v. Fuller, 51 Fla 380 (1906).

Other references: McQuillin, Municipal Ordinances, pp. 816, 817.
 Dillon, Municipal Corporations, vol. 2, sec. 987.

OPINION OF FOREGOING SYNOPSIS

We have your letter together with statement in the claim of the Postal Telegraph Cable company of Illinois for expense incurred in lowering conduit line in 32nd street crossing South LaSalle street. You request an opinion as to the liability of the City in the premises.

In a statement, hereto attached, the Postal Telegraph Cable Company alleges:

"* * * that, the Telegraph Company complied with the request of the Department of Public Works and lowered its conduit line during the month of November, 1933, in order that the new water main could be laid.

"That, the Telegraph Company incurred an expense of \$93.67 in carrying out this work to cooperate with the Department of Public Works and rendered a bill in that amount to the City.

"That such expense of \$93.67 should be borne by the Department of Public Works as the Telegraph Company had prior rights to the location it occupied before the Department of Public Works planned the new water pipe extension.

"Wherefore, the Telegraph Company requests that the Department of Public Works reimburse it in the amount hereinabove mentioned."

In the use of its streets for the building of subways, sewers and the laying of water mains, etc., the city of Chicago has consistently held to the principle that, while it may grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes such as railroad tracks, poles, wires, conduits, and gas pipes, such rights are at all times held in subordination to the superior rights of the public, and such tracks, poles, wires, conduits, and pipes are subject to relocation or removal at the expense of the grantee of the privilege whenever the public convenience or necessity requires the space in the streets so occupied.

This principle has been approved by McQuillin in his work on *Municipal Ordinances*:

"Sec. 521. *Improvements interfering with franchise rights.* Ordinances granting to individuals and corporations the privilege of occupy-

ing the streets and public ways for lawful purposes, as for railroad tracks, poles, wires, gas and water pipes, when accepted and acted on by the grantees thereof become, as stated elsewhere, contracts, the obligations of which cannot be impaired constitutionally by act of the municipality. However, such rights are held in subordination to the superior rights of the public. As explained in a prior chapter, all necessary and desirable police ordinances, which are reasonable, may be enacted and enforced, to protect the public health, safety and convenience, notwithstanding the enforcement of such regulations may interfere with legal franchise rights. Thus a water company, placing its pipes in the streets under a franchise contract with the local corporation, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets, whenever and wherever the public interest demands; and if, in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof. * * *

"The municipality cannot, by any franchise it may grant, relinquish any of its rightful authority over its streets, or, indeed, any municipal function whatever. Every franchise conferred by it is subject to this limitation, whether expressed therein or not." (McQuillin, *Municipal Ordinances*, at pages 816 and 817.)

In *2nd Dillon on Municipal Corporations*, section 987, the text writer says:

"A telephone company placing its conduits, poles and wires in the streets under a franchise contract with the city does so in subordination to the superior rights of the public through its duly constituted authorities to construct public improvements in the same streets whenever and wherever the public interest demands, and if in consequence of the exercise of this right the telephone company is compelled to relay its conduits and wires and reset its poles, in the absence of unreasonable or malicious conduct on the part of the municipality it has no cause of action against it (the municipality) for reimbursement on account thereof."

In the case of *National Water Works Co. v. City of Kansas*, 28 Fed 921, the opinion of the court is thus summarized in the syllabus:

"A water company laying its pipes in the streets of a city, under a contract with the city, does so subject to the right of the city to construct sewers in said streets whenever and wherever the public interest demands, and if, in consequence of the exercise of this right, the company is compelled to relay its pipes, it can maintain no claim therefor against the city, unless the action of the city is unreasonable or malicious."

The rights of the public in the use of the streets are paramount to all other interests. In this connection our Supreme Court in the case of *Sears v. City of Chicago*, 247 Ill 204, at page 215, said:

"Whatever title the City has in its streets and other public grounds is held in trust for the public, and this is true whether it owns the fee or only an easement. The interest of the public, which is the primary object of the trust, must always be paramount to all other interests. The city cannot grant away the rights of the public, nor can they be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public. (*Elliott on Roads and Streets*, sec. 17; *State v. Murphy*, 134 Mo. 548; 34 L. R. A. 369; *Matthiessen & Hegeler Zinc Co. v. City of LaSalle*, 117 Ill. 411)."

The Texas Civil Appeals Court discussed the principle involved here in the following language:

" * * * To the uses of the public at large primarily was the street dedicated, and though, under special license from the municipality as the custodian of the street, street railways may be laid in the streets, by reason of the fact that they contribute to the general convenience and thus possess a *quasi*-public character, the very reason or ground upon which these licenses are permitted carries with it the recognition of the dedication of the street primarily to strictly public use. In making use, therefore, of a public street to lay sewers therein, though loss ensue to the street railway company, the public through its representative, the municipality, is not invading or injuring private property. It is but appropriating that which is its own. The street railway company having only a right to use the street until needed by the public, has no more right to complain of the public's thus reclaiming its own than would the tenant of a particular estate, depending for its duration upon the happening of a certain event, be justified in complaining of the entry of the remainder-man upon the happening of the event. Though the analogy is not complete, yet the subordination of right is as clear in the case as in the other." (*City of San Antonio v. San Antonio Street Ry.*, 15 Texas Civil Appeals 1, at page 8.)

In Florida, the Supreme Court presented the same principle of law in this way:

"Another rule well settled in the law of municipal corporations is that such a corporation, when it confines itself within the limits of its power and jurisdiction is not liable to an action for consequential damages to private property or persons (unless it be given by special constitutional provision or by statute) where the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable. 2 Dill. Mun. Corp. (4th ed.) Sec. 987, *et seq.* And while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health,

safety and convenience, notwithstanding the same may interfere with legal franchise rights. A water company placing its pipes in the streets under a franchise contract with the city, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets, whenever and wherever the public interest demands; and if in consequence of the exercise of this right, the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursements on account thereof. *McQuillin*, Mun. Ord., Sec. 521; *National Water Works Co. v. City of Kansas*, 28 Fed. Rep. 921; *Kirby v. Citizens Ry. Co.*, 48 Md. 168; *Elliott on Roads and Streets*, Sec. 476; *New Orleans Gas Co. v. Drainage Com.* 197 U.S. 453." (*Anderson v. Fuller.*, 51 Fla 380, at pages 392 and 393.)

While it is well settled that a municipality is bound to use reasonable care in the maintenance of its streets, sewers, and water works, and is liable for injuries to persons or property growing out of the negligence of the municipality or its employees in such maintenance, it appears to us to be equally well settled that the public has prior and superior rights in the use of the streets, and that any privileges granted to private persons or corporations in the use of the streets must yield to the necessities of the public as determined by its duly constituted municipal authorities. As there is no question of negligence or lack of skill on the part of the municipality or its employees involved here, we find no reason why the city of Chicago should change its policy of strict adherence to the long established principle of the City's right to require individuals and corporations to relocate or remove their equipment from the City's streets at their own expense whenever the space so occupied is needed for municipally owned facilities operated and maintained for the benefit and convenience of its inhabitants and the general public. We are of the opinion, therefore, that the petition of the Postal Telegraph Cable company for reimbursement of the cost of relocating its conduit line should be denied.

* * * * *

LIABILITY FOR DAMAGE TO TELEPHONE CONDUIT

(No. 9224—*Commissioner of Public Works—E.L.M.—December 1, 1937—5½ pp.*)

The City is not liable for damage caused to a conduit of the Illinois Bell Telephone company while its workmen were laying a water main as those workmen exercised reasonable care, skill, and vigilance. A telephone company which places its conduits in a City's streets under a franchise contract with the City does so in subordination to the superior rights of the public to con-

struct public improvements in its streets whenever and wherever the public interest demands, and if in the exercise of this right the telephone company conduit is damaged, and there has been no want of reasonable care or reasonable skill and vigilance on the part of the City, its officers, agents, or employees, the telephone company has no cause of action against the City for reimbursement of that damage.

Opinion No. 9728 (3 pp.) of December 15, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE TO UTILITY CONDUIT AND CABLE

(No. 9691—Chairman, Committee on Finance—E.L.M.—November 4, 1937—4½ pp.)

The City is not liable for damage to a conduit and cable of Commonwealth Edison company by City workmen connecting a service pipe to a new water main when the workmen exercised reasonable care and skill in performing their work, and Commonwealth Edison company failed to exercise reasonable care for the safety and protection of its conduit and cable.

Opinion No. 9728 (3 pp.) of December 15, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE TO PARK DISTRICT ELECTRIC LIGHT CONDUIT

(No. 9559—Commissioner of Public Works—A.F.G.—July 15, 1937—4 pp.)

The City is not liable for damage caused to an electric light conduit in Marquette boulevard belonging to the Chicago Park District when the City was repairing its water pipe shut-off valves in that boulevard, as it used due care and caution, as the right of the Park District to lay conduits in Marquette boulevard

is subordinate to the right of the City to lay and repair water mains and their appurtenances, by virtue of reservations in the ordinances dedicating the streets which constitute Marquette boulevard to the Park District, and as it is but fair to presume that when the Park District laid its conduit in the location and manner it did, it intended to assume all liability for any damage necessarily caused to the conduit if the City found it necessary to repair the shut-off valves.

Citations:

Ordinance: Hoover, Special Ordinances (1915), pp. 390, 400, 406.

Case: Johnston v. Chicago, 258 Ill 494 (1913).

(5) *Sewers*

**LIABILITY FOR DAMAGE OR INJURY BY EMPLOYEES
ENGAGED IN SEWER MAINTENANCE**

(No. 9706—Chairman, Committee on Finance—E.L.M.—November 22, 1937—3 pp.)

In maintaining a sewer system the City acts in its corporate or private capacity. It is, therefore, liable for damage or injury caused by the failure of its employees engaged in sewer maintenance or repair work to exercise reasonable care and skill.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9336—November 19, 1936—1½ pp.

No. 9582—August 4, 1937—3 pp.

No. 9701—November 12, 1937—2½ pp.

NON-LIABILITY WHEN EMPLOYEES NOT NEGLIGENT

(No. 9305—Chairman, Committee on Finance—E.L.M.—October 13, 1936—3 pp.)

The City is not liable for damage allegedly caused by employees of the City performing a corporate function when those

employees were not negligent but acted with reasonable care and skill.

The City, therefore, is not liable for damage from overflowing because of a defective private drain connecting private property with the main sewer, when City employees repaired a cave-in of the main sewer promptly after notice.

LIABILITY FOR DAMAGE BY SEWER EXPLOSION

(No. 9703—Chairman, Committee on Finance—E.L.M.—November 13, 1937—2½ pp.)

The City is not liable for damage to property by a sewer explosion which did not result from any negligence on the part of the City, its officers, agents, or employees, but which resulted from the unlawful acts of outside agencies, acts of which it by the exercise of reasonable care and diligence could have had no knowledge, and over which it had no control prior to, or at the time of, the explosion.

LIABILITY FOR DAMAGE BY SEWER CAVE-IN

(No. 9733—Chairman, Committee on Finance—E.L.M.—December 23, 1937—2½ pp.)

The City is liable for damage to an automobile caused by the caving in of a sewer in an alley, the City having had notice of the cave-in, and having failed to restore the alley to a reasonably safe condition for public use or to barricade the alley to public travel until such a time as permanent repairs could be made.

Citation: *Simon v. Chicago*, 279 Ill App 80 (1935).

LIABILITY FOR DAMAGE BY LEAKING DRAIN PIPES

(No. 9205—Chairman, Committee on Finance—E.L.M.—June 22, 1936—3½ pp.)

The City is not liable for damage by water which entered a basement as a result of leakage from the drain pipes connecting the building with the main sewer, the drain pipes being the property of, and in the care of, the owner of the building.

Citations:

Ordinance: Code '31: 768.

Cases: Litchfield v. Southworth, 67 Ill App 398 (1896).

City of Aurora v. Gillett, 56 Ill 132 (1870).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper, invoice, and correspondence in the claim of Rubinelli-Rocco, Inc. * * * * for damage to property. You request an opinion as to the liability of the City in the premises.

The statement of claim submitted to us appears in the invoice hereto attached and reads as follows:

"Damages caused by water entered in basement at 804 W. Randolph Street on May 12, 1935, due to unfinished work left by your department\$150.00"

The Division of Water Pipe Extension and the Bureau of Sewers deny allegation that the flooding of the basement complained of resulted from any activity or any failure to act on the part of said division or bureau.

Loran D. Gayton, Acting City Engineer, reports and incorporated this report in a letter to Rubinelli-Rocca, Inc., under date of July 31, 1935, copy of which is hereto attached:

"On May 13, 1935, the Division of Water Pipe Extension received a complaint that water was running into the basement at 804 W. Randolph Street. Mr. Gleason, plumbing inspector of that Division, made an inspection and notified the plumbing shop to test out meter and meter vault in the above basement. These were found to be o.k. and were not leaking. At that time it was assumed that the leakage was sewer water.

* * * * *

"So that the Division of Water Pipe Extension might have a clear understanding of the nature of the leakage, a laboratory test was made of the water which seeped into the basement and the Health Department reported that the seepage was sewer water."

George E. McGrath, Superintendent, Bureau of Sewers, states and incorporated this statement in a letter to Rubinelli-Rocca, Inc., under date of September 20, 1935, copy of which is hereto attached:

"To make this Bureau's position clear, it must be understood that our activities are confined to the main sewerage system, embracing the main sewers, the manholes and the catch basins receiving street wash. The City gives main sewer service but it is up to the property owners to deliver the sewage from their property into the main sewers."

The law is settled that when a city undertakes to build a sewer, it becomes bound to use due care in constructing the sewer with reference to its size, fall, and inlets; and that, if the sewer proves insufficient to adequately carry off the ordinary annual rainfalls, it may be inferred that there was a lack of such due care in the construction of the same. In such a case the City is therefore liable for damage resulting therefrom. (*City of Litchfield v. Southworth*, 67 Ill App 398.)

Likewise the City is liable for damages due to overflow, where the overflow results from the drains and sewers having become obstructed by debris. (*City of Aurora v. Gillett*, 56 Ill 132.)

Section 768, article V, chapter 13 of the Revised Chicago Code of 1931 provides:

"768. *Charge of sewers and drains—cleansing, etc.—connections—permits.*) All sewers and drains in any of the streets, alleys, avenues or public places in the city shall be under the charge of the department of public works, and they shall be kept in good order and condition and clean and free from obstruction; and the commissioner of public works shall cause such repairs thereof, and of the receiving basins, culverts and openings connected therewith, to be made as may from time to time become necessary.

"The commissioner of public works shall prescribe the mode of piercing or opening any of such sewers or drains, and the form, size and material of the connections made therewith, and shall have authority to grant permission to make lateral connections with such sewers."

In the instant claim no charge is made or facts presented that would indicate that the damage complained of was the result of faulty construction, lack of capacity, or obstructions in the sewer system of the City. The report of the Acting City Engineer shows conclusively that the water in question was sewer water. The report of the Superintendent of the Bureau of Sewers indicates no defects in the main sewer or catch basins caused the damage complained of. It appears from all the facts and circumstances available that the water entered the basement as a result of leakage from the drain pipes connecting the building with the main sewer, said drain pipes being the property of and in the care of the owner of the building with no duty resting upon the City to keep them in repair. We are of the opinion, therefore, that the city of Chicago is not liable for the damage herein complained of.

* * * * *

LIABILITY FOR DAMAGE BY MANHOLE EXPLOSION

(No. 9239—*Chairman, Committee on Finance—E.L.M.—May 28, 1936—21½ pp.*)

The City is not liable for damage to an automobile caused by a manhole exploding as the automobile passed over it, as the damage did not result from any negligence on the part of the City or its employees. The City is bound only to exercise due care and skill in constructing and maintaining its sewers, and is not an insurer of the safe condition of its sewers.

Citation: *City of Joliet v. Seward*, 86 Ill 402 (1877).

CITY LIABILITY FOR DEFECTIVE SEWER COVER

(No. 9407—*Chairman, Committee on Finance—E.L.M.—January 25, 1937—2 pp.*)

The City is not liable for injuries caused to a person by an allegedly defective sewer cover unless it is shown that the City failed to exercise reasonable care to keep the sewer cover in a reasonably safe condition. The mere fact that an injury has been suffered because of some defect in a street does not of itself make the City liable.

(6) *Other Corporate Activities*

LIABILITY FOR NEGLIGENCE IN CORPORATE ACTIVITY

(No. 9024—*Chairman, Committee on Finance—E.L.M.—January 24, 1936—21½ pp.*)

The City is liable for damage to property resulting from the negligence of its officers, agents, or employees when exercising its corporate or private powers.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the preceding opinion.

No. 9032—February 3, 1936—2½ pp.

No. 9115—April 6, 1936—2 pp.

No. 9635—October 8, 1937—1½ pp.

No. 9673—October 26, 1937—2½ pp.

No. 9692—November 4, 1937—2 pp.

LIABILITY FOR DAMAGE BY CITY TRUCK WHEN CLAIMANT NEGLIGENT

(No. 9154—Chairman, Committee on Finance—E.L.M.—May 8, 1936—2 pp.)

The City is not liable for the damage caused to an automobile by a City truck engaged in a corporate activity when the driver of the automobile was negligent. A person cannot recover damages for an injury resulting from the negligence of another unless he himself is free from negligence in the matter, and can show that at the time of the injury he was exercising due care and caution for his own safety.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9161—May 15, 1936—2 pp.

No. 9162—May 15, 1936—2 pp.

No. 9169—May 19, 1936—2 pp.

No. 9198—June 12, 1936—3½ pp.

No. 9202—June 17, 1936—2½ pp.

No. 9220—July 3, 1936—3½ pp.

No. 9237—July 20, 1936—2½ pp.

No. 9290—September 21, 1936—2½ pp.

No. 9364—December 10, 1936—3 pp.

No. 9510—April 27, 1937—2½ pp.

No. 9576—July 27, 1937—1½ pp.

No. 9679—October 29, 1937—3 pp.

No. 9680—October 28, 1931—3 pp.

No. 9687—November 3, 1937—2½ pp.

LIABILITY WHEN CLAIMANT NEGLIGENT

(No. 9289—*Chairman, Committee on Finance—E.L.M.—September 21, 1936—3 pp.*)

The City is not liable for damage to an automobile which crashed into a tree stump lying in a street when the driver of the automobile failed to exercise due care and caution for the safety of the automobile. A person cannot recover damages for an injury resulting from the negligence of another unless the claimant is free from negligence in the matter himself and able to show that at the time of the injury he was exercising due care and caution for his own safety.

CLAIM WHICH SUBMITS NO EVIDENCE OF INJURY OR EXTENT OF INJURY

(No. 9477—*Chairman, Committee on Finance—E.L.M.—April 3, 1937—2 pp.*)

The Committee on Finance could not legally justify the recommendation for payment of a claim for pecuniary damages which is accompanied by no evidence showing the existence of injuries and their extent. A recovery of pecuniary damages must be based on evidence of facts, circumstances, and data which justify an inference that the damages awarded are a just and reasonable compensation for the injuries.

LIABILITY FOR INJURIES BY "PLUMBER'S" FURNACE

(No. 9052—*Chairman, Committee on Finance—E.L.M.—February 11, 1936—5 pp.*)

The City is liable for injuries received by a four-year-old boy who collided with a "plumber's" furnace placed on a sidewalk by a City construction crew which was working on the City's street lamp poles. The placing of a red-hot stove in the center

of a sidewalk in a residence street and leaving it unguarded was not exercising the "degree of care commensurate with the danger" required of the City.

Citations: Simon v. Chicago, 279 Ill App 80 (1935).
Roumbos v. Chicago, 332 Ill 70 (1929).
Stedwell v. Chicago, 297 Ill 486 (1921).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper and correspondence in the claim of Sam Zamen * * * * for personal injuries to his son in the sum of \$300. You request an opinion as to the liability of the City in the premises.

Mr. Zamen makes the following statement of his claim:

"On August 1, 1935, around 8:30 in the morning, my youngest son was out riding on his bicycle in front of the house, and about 100 feet up the street the City Electrical Division was working on the change of street lights.

"The solder stove that is used for the melting of solder was placed right on the sidewalk—and at the time my son passed it, the man on duty had gone across the street to pick up some solder, and during his absence a child's curiosity got the best of my son, and from what we can gather, he, in circling around this stove, fell, and probably to break his fall he grabbed for the pot. The stove containing tremendous heat seared the palm of his hand causing it to blister, and at the same time it did not break his fall, but instead, he fell completely from his bicycle on to the stove, burning his leg from just above the knee almost up to his hip. Being summertime, naturally he wore a very short wash suit.

"He was immediately rushed up to the house and first aid was administered until the doctor could arrive.

"Immediately after the doctor took charge my son was confined to his bed for a couple of days. In the meantime, the shock weakened him so that he came down with bronchitis.

"A child of this age naturally is quite fussy and during his stay in bed, both on account of his leg and hand and then the bronchitis, Mrs. Zamen and I were up practically all through these nights. The doctor ordered that as soon as his fever had subsided that he be taken away for a rest. So about a week later the family was packed up and shipped, * * * * and having incurred an expense of around \$300, which was the actual expenditure for doctor's fees and expense of sending the family away, I feel that a reimbursement is certainly due me.* * *"

The Department of Streets and Electricity makes the following report, copy hereto attached:

"The four-year-old son of Mrs. Samuel Zamen * * * * was injured where my gang was working at 8:30 a. m., on August 1, 1935. The circumstances are as follows:

"Our plumber's furnace was placed on the sidewalk in front of No. 6831 Crandon Avenue, and this boy riding past the location on a bicycle struck the furnace. The furnace was knocked over and this caused the boy to be burned on the left leg above the knee, and also burning his four fingers and palm of left hand. The accident happened while our laborer, John Lind, had taken the solder pot over to the lamp pole for the lineman to solder joints."

The Division of Investigation of the Law department under date of January 22, 1936, reports an interview with the mother of the injured child in which she stated that the boy "is all right now and there are no scars left." The Division of Investigation also reports the following statement of the attending physician, Dr. J. E. Leahy * * * * .

"I treated Robert Zamen * * * * for burns of the left hand and left leg. I went to his home eight times and his mother brought him to my office a couple of times. He was burned pretty bad and was very nervous and I advised his mother to take him to the country for a few weeks. My bill is not made up as yet but it will be about \$75.00."

In defining the duty of a municipality in the care of its streets, the reviewing courts of Illinois have consistently held:

"That the city must use reasonable care to keep its streets in a reasonably safe condition for the use of the traveling public is the settled law of this State. (*Purcell v. City of Chicago*, 231 Ill 164.) * * * (*Simon v. City of Chicago*, 279 Ill App 80.)

In the case of *Roumbos v. City of Chicago* (332 Ill 70), the Supreme Court said:

"In this State the care of the streets and sidewalks, their lighting and maintenance, have always been held to be the corporate functions of the municipality, and the municipality has been held liable for the negligence of its employees in the performance of those functions which has resulted in injury to others. * * *"

In *Stedwell v. City of Chicago* (297 Ill 486), where a small boy sought to recover damages for personal injuries caused by reason of his coming in contact with an electric light wire carrying a high voltage of electricity owned by the city of Chicago, and used by it for the purpose of supplying current to arc lights in the streets of the City, our Supreme Court said:

"Plaintiff in error (the city of Chicago) contends that in lighting its streets it was exercising its governmental function and therefore not liable to anyone injured by coming in contact with wires used for that purpose. The point is conclusively settled contrary to the contention of plaintiff in error. (Citing authorities). The city of Chicago was therefore bound to know the dangers incident to lighting its streets with electricity and to guard against accidents by the exercise of a degree of care commensurate with the danger. * * *"

" * * Where an attractive thing is so located that in yielding to its allurements a child is brought in direct contact with a danger placed there by someone else, the person responsible for creating the dangerous condition will be liable."

It appears from the statements of Samuel Zamen, father of the boy, and E. R. Barrington, foreman of the City electrical construction gang that the boy was injured and that the injury was caused by the boy colliding with a "plumber's" furnace which was placed on the sidewalk by the City construction crew while the crew was engaged in working on street lamp poles owned and used by the city of Chicago. It further appears from the statement of Mrs. Zamen, mother of the boy, and Dr. Leahy, the attending physician, that the child incurred no permanent injuries and that he has fully recovered from the injuries sustained.

The decisions of the Supreme Court of our State applied to the facts presented by the claimant and the City employees indicate the liability of the City in the claim here under consideration. The placing of a red hot stove in the center of the sidewalk in a residence street and leaving it unguarded was not exercising the "degree of care commensurate with the danger" required of the City. We are not in a position to determine whether or not the amount claimed (\$300) is a fair and reasonable sum to compensate Mr. Zamen for his expenditures occasioned by this occurrence. We are of the opinion, however, that the city of Chicago is liable for such expenditures as were actually made necessary as a result of the injury herein described.

* * * * *

LIABILITY FOR INJURY TO CHILD BY WEED CUTTING MACHINE

(No. 9535—Chairman, Committee on Finance—E.L.M.—June 4, 1937—31½ pp.)

The City is liable for injuries caused to a child by one of its weed cutting machines when the driver of the machine failed to exercise the degree of care that the law requires an adult to use toward a child while operating a five and one-half foot knife blade in a public street with knowledge of the child's nearby presence. A municipal corporation is bound to use reasonable care to keep its public places reasonably safe.

Citation: *Johnson v. City of St. Charles*, 200 Ill App 184 (1917).

OPINION OF FOREGOING SYNOPSIS

We have your letter together with Council paper and doctor bill in the claim of Stanley Srebro * * * * for expenditures occasioned by injury

to his ten-year-old son, Frank Srebro, when he came in contact with a City weed cutter on the public street. You request an opinion as to the liability of the City in the premises.

Claimant states that on August 10, 1933, his ten-year-old son was on his way home, going west on 47th street, and at Komensky avenue a City employee was operating a grass cutter in the street; that the boy did not notice the man running the machine and stumbled into it, cutting both of his legs; that the boy was laid up for a month under a doctor's care and claimant expended \$75.00 for doctor's service and medicine.

Under date of August 14, 1933, James J. Mitchell, district superintendent of the 13th ward, made the following report of this occurrence:

"Just to inform you that Mr. Jacob Smit * * *, driver of Weed Mowing Machine, had an accident on August 10, 1933.

"As he was driving along 47th Street between Crawford and Komensky avenue's (sic), cutting weeds on parkway, Frank Srebro * * * * ten year old boy, walked directly in front of cutter and stumbled into cutting knives, receiving several cuts on both legs which required five stitches on right leg and two stitches on left leg, according to the attending family Physician Dr. Baikovich * * * *"

A report submitted by Jacob Smit, driver of the weed cutter, follows:

"I was going east guiding two horses drawn to the mowing machine. I was sitting on the seat on top of the machine. The knife (grass cutter) is 5½ feet long. I saw a child on the sidewalk facing north. On turning left as I reached near the alley, I had no other choice as the electric light wires were in my way, I called out a warning to the child, but he didn't seem to pay any attention. The cutter cut the child on his leg, and he fell back. He picked himself up so fast and went home. I wasn't able to leave my horses, but when I got home I made out my report."

A municipal corporation is bound to use reasonable care to keep its public places reasonably safe. No hard and fast rule of what constitutes reasonable care can be laid down that would apply in every case. What would be reasonable care in the case of an adult might not be sufficient care to properly protect a minor child. Likewise, what would be considered reasonable care when exercised in the case of a minor child in the company and charge of its parents or other adult persons might well be considered as not constituting reasonable care in the case of a minor child or children unaccompanied by an adult.

A municipal corporation is not liable for injuries that could not have been prevented by the exercise of reasonable care and vigilance. Liability can only be predicated on the City's neglect or misconduct.

The Illinois Appellate Court, in discussing the degree of care required to protect children and the degree of care required of children for their own safety, said:

"* * * In *Trapp v. Rockford Elec. Co.*, 186 Ill. App. 379, we considered the degree of care required of children and discussed several

holdings of our Supreme Court on that question, and noted the purpose of the law 'to protect children against their lack of sound judgment.' It was said in *Sutton v. Arrow Transfer Co.*, 186 Ill. App. 188: 'A child is not required to exercise the same degree of care as an adult, but only such care as a child of his age, intelligence, experience and capacity would ordinarily exercise.' In the late case of *Hartnett v. Boston Store of Chicago*, 265 Ill 331, the court citing many authorities, said: 'A minor may reasonably be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion and experience would naturally and ordinarily use.' The law recognizes the lack of judgment, caution and discretion in children and the consequent inability to take care of themselves, and requires adults to take notice of these tendencies and conduct business with that in view and reasonably guard against injuring them. Accident cases are very numerous in which children have been held not guilty of contributory negligence where adults would clearly have been found not in the exercise of ordinary care for their own safety." (*Johnson v. City of St. Charles*, 200 Ill App 184, at page 188.)

It appears from the somewhat disconnected statement of Smit, the driver of the grass cutting machine, that he failed to exercise that degree of care the law requires an adult to use toward a ten year old child while operating a five and one-half foot knife blade in the public street with knowledge of the child's presence nearby, and we are of the opinion, therefore, that the City is liable for such expenditures as were actually made necessary as a result of the injury herein described.

* * * * *

LIABILITY FOR EMPLOYEES' NEGLIGENCE

(No. 9419—Chairman, Committee on Finance—E.L.M.—February 1, 1937—2 pp.)

The City is liable for damage to a privately maintained street lighting post caused when City employees were negligently putting up a new trolley post, as they were performing a corporate function.

LIABILITY FOR DAMAGE BY EMPLOYEE OUTSIDE OF HIS EMPLOYMENT

(No. 9571—Chairman, Committee on Finance—E.L.M.—July 26, 1937—1½ pp.)

The City is not liable for damage by one of its employees which was not caused by him in the course of his employment.

LIABILITY FOR DAMAGE TO EMPLOYEE'S PROPERTY

(No. 9178—*Chairman, Committee on Finance—E.L.M.—May 25, 1936—2 pp.*)

The City is not liable for damage caused to property of an employee of the City when he sustained personal injuries while performing his duties unless it is shown that negligence on the part of the City was the direct and immediate cause of the damage.

**LIABILITY FOR DAMAGE TO EMPLOYEE'S AUTOMOBILE
USED IN CITY'S SERVICE**

(No. 9222—*Chairman, Committee on Finance—E.L.M.—July 7, 1936—4½ pp.*)

The City may properly reimburse a City employee for the actual cost of damage to his automobile while used in City business when the City knowingly permitted the use of that automobile by the employee in the performance of his duties and accepted the benefits of that use.

As the damage to the claimant's automobile resulted from the negligence of a third party, he should exhaust his remedy against that party before seeking reimbursement from the City.

Opinion No. 9221 (3½ pp.) of July 7, 1936, to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY CITY TRUCK

(No. 9721—*Chairman, Committee on Finance—E.L.M.—December 7, 1937—3 pp.*)

The City is not liable for damage caused to an automobile by one of the trucks of the Department of Electricity when the driver of the truck was exercising care, caution, and skill in operating the truck, and the claimant failed to exercise the care and caution for the safety of her automobile that an ordinarily

prudent and careful automobile driver would exercise in similar circumstances.

Opinion No. 9735 (2½ pp.) of December 27, 1937, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY NEGLIGENT OPERATION OF CITY TRUCK

(No. 9016—Chairman, Committee on Finance—E.L.M.—January 15, 1936—2 pp.)

The City is liable for damage to property caused by the driver of a City truck who failed to exercise reasonable care and skill in operating the truck, when the truck was being used in a corporate function of the City.

The following opinions to the Chairman of the Committee on Finance hold substantially the same as the above opinion.

No. 9101—March 23, 1936—2 pp.

No. 9107—March 28, 1936—3½ pp.

No. 9184—May 26, 1936—2½ pp.

No. 9225—July 8, 1936—3 pp.

No. 9312—October 15, 1936—3 pp.

No. 9362—December 9, 1936—2½ pp.

No. 9575—September 27, 1937—3 pp.

LIABILITY FOR INJURIES AT NAVY PIER

(No. 9284—Chairman, Committee on Finance—E.L.M.—September 15, 1936—2½ pp.)

The City is bound to use reasonable care to keep its public places, such as Navy Pier, reasonably safe, but it is not liable for injuries to a person that could not have been prevented by the exercise of reasonable care and vigilance, or which resulted from the person's failure to exercise due care and caution for his own safety.

Opinion No. 9173 (4½ pp.) of May 21, 1936, to the Chairman of the Committee on Finance holds substantially the same as the above opinion.

LIABILITY FOR DAMAGE BY FALLEN ELECTRIC WIRE

(No. 9294—*Chairman, Committee on Finance—E.L.M.—September 28, 1936—51½ pp.*)

The City is liable for injuries to persons or property resulting from electric light wires falling in its streets, whether such wires are owned by the City or by a private corporation, when the City has failed to exercise reasonable care to protect the traveling public from the danger attendant upon the presence above or below its streets of high voltage electric wires for street lighting purposes.

However the City is not liable for damage from a falling live electric light wire in the street when no negligence of the City is shown and it had no actual notice that the wire was defective or dangerous and circumstances were not such that notice to the City would be implied.

Citations:

Cases: Village of Palestine v. Siler, 225 Ill 630 (1907).

Goetzke v. Chicago, 174 Ill App 446 (1898).

Other reference: McQuillin, Municipal Corporations, vol. 7, sec. 2964.

LIABILITY FOR ILLEGALLY REMOVED PRIVATE LAMP POSTS

(No. 9102—*Chairman, Committee on Finance—E.L.M.—March 23, 1936—21½ pp.*)

Although the City had the legal right to remove street lamp posts belonging to a private person, it is liable for the value of posts which it removed and destroyed without making any request or demand upon the owner to remove.

LIABILITY FOR DAMAGE TO UTILITY DUCT LINE

(No. 9690—*Chairman, Committee on Finance—E.L.M.—November 4, 1937—2 pp.*)

The City is not liable for damage caused by its employees to a concrete duct line owned by Commonwealth Edison company

when that company was negligent in laying the duct line unusually close to the surface of the street where its presence would not be anticipated by City workmen exercising ordinary care, skill, and diligence.

LIABILITY FOR DAMAGE ON LEASED PREMISES

(No. 9262—*Chairman, Committee on Finance—E.L.M.—August 12, 1936—4 pp.*)

The City is not liable for damage to boilers in premises which it occupied as a lessee, since under the terms of the lease there was no duty to keep in repair and good order the heating plant located on the premises, and the City exercised due diligence in promptly notifying the lessor of the immediate need of repairs. The damage to the boilers occurred as a result of the negligence of the lessor to make the repairs promptly.

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